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No. 88-

In The
Supreme Court of the United States

October Term, 1988
No. 88-

KAREN APPLEGATE and PHIL APPLEGATE, individually, and as parents of the late COLLEEN APPLEGATE, aka "SHAUNA GRANT",

Petitioners,

vs.

People of the State of California, and HAROLD FREEMAN,

Respondents,

vs.

JOHN VAN DE KAMP, Attorney General of the State of California, IRA REINER, District Attorney of Los Angeles County, JAMES K. HAHN, City Attorney of the City of Los Angeles,

Real Parties In Interest.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTION PRESENTED

1. DOES THE CONDUCT OF HIRING AN ACTOR TO PERFORM SEX ACTS (SEXUAL INTERCOURSE, ORAL COPULATION AND SODOMY) IN MOTION PICTURE FILMS CONSTITUTE FREE SPEECH, WHICH IS PROTECTED BY THE FIRST AMENDMENT[1], WHICH MAY NOT BE REGULATED BY GOVERNMENT EXCEPT WHERE THE FILM ITSELF IS ALSO PROVEN TO BE OBSCENE UNDER FEDERAL OBSCENITY STANDARDS?

[1]This "lewd conduct-free speech" federal question "tracks" the federal question which is presently before this court in Texas v. Johnson No. 88-155, see Texas v. Johnson, ___US___, 49 CCH Supreme Court Bulletin (October 17, 1988) at page 132, namely:

> "Does The Public Burning Of An American Flag During The Course Of A Political Demonstration Constitute Free Speech Subject To The Protection Of The First Amendment?"

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Real Parties In Interest,

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Karen Applegate and Phil Applegate, individually and as parents of the late Colleen Applegate, also known as "Shauna Grant," pray for leave to intervene and further pray that a Writ of Certiorari be granted to review the judgment of the Supreme Court of California entered in People of the State of California V. Harold Freeman on August 25, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of California in People of the State of California V. Harold Freeman is printed at Appendix A hereto, and is reported at 46 Cal.3d 419, 250 Cal.Rptr. 598 (Aug. 25, 1988). The opinion of the Court of Appeal, Second District, Division 4 (Kingsley, Acting Presiding Justice, Arguelles, McClosky), in People of the State of California V. Harold Freeman is printed at Appendix B hereto, and is reported at

233 Cal.Rptr. 510 (Jan. 6, 1987). The opinion of the Court of Appeal, Second District, Division 4 (Kingsley, Acting Presiding Justice, Arguelles, McClosky), in People of the State of California V. Harold Freeman is printed at Appendix C hereto, and is reported at 234 Cal.Rptr. 245 (Feb. 2, 1987).

Petitioners Karen Applegate and Phil Applegates' "Motion for leave to file brief amicus curiae in support of petition for rehearing by respondent pursuant to Rule 27 (b); or in support of a hearing granted on the Court's own motion before the decision becomes final pursuant to Rule 27 (a); with brief amicus curiae annexed," which was received by the Clerk on Sept. 9, 1988 and filed by the Court on Sept. 14, 1988, is printed at Appendix D hereto. The order of the California Supreme Court filed Oct. 20, 1988, denying petitioners'

motion, is printed at Appendix E hereto. The remittitur of the California Supreme Court, filed October 21, 1988, is printed as Appendix F hereto.

JURISDICTION

The judgment of the Supreme Court of California was entered on August 25, 1988. On September 9, 1988, Petitioners served on the parties and lodged with the Clerk of the California Supreme Court their timely "Motion for leave to file brief amicus curiae in support of petition for rehearing by respondent, pursuant to Rule 27 (b); or in support of a hearing granted on the Court's own motion before the decision becomes final, pursuant to Rule 27 (a)." On Wednesday, September 14, 1988, the California Supreme Court filed the same and extended its jurisdiction to act on said motion to October 24, 1988. On October 20, 1988, the Court entered an order denying petition-

ers' motion. See order at Appendix E hereto.

Pursuant to such action, the judgment which was entered on August 24, 1988 did not become final on September 24, 1988, but was stayed for an additional 26 days until October 20, 1988, when the Court entered its order denying petitioners' motion. Because an appeal may only be taken from a final judgment, the statutory period of 60 days must be deemed to have been tolled during that period. Accordingly, the time for filing the petition for Writ of Certiorari, under Rule 20.4 of the United States Supreme Court Rules, runs from the date of the denial of the Motion for Rehearing on October 20, 1988. Further, the action of the California Supreme Court on Sept. 14, 1988 extending its jurisdiction, and on October 20, 1988 denying petitioners' motion, logically must be viewed as an order allowing moving

party (petitioners) to intervene as a "party." Only a party to the proceeding can make a motion therein. Difani V. Riverside County Oil Co. (1927) 201 Cal. 210, 214, 6 Witkin, California Procedure (Third Edition) at page 329. See, also, Hunter V. Ohio ex rel. Miller 396 US 879 (1969), in which this Court allowed a non party in state court proceedings to intervene, which petition was thereafter denied. See Stern, Gressman and Shapiro, Supreme Court Practice (Sixth Edition) at page 47. At footnote 14, the authors point out that in state cases, 28 USC Sect. 1257 (3) does not require that the petitioner be a party below; whereas in federal cases, 28 USC Section 1254 (1) does. Jurisdiction also exists under the private attorney general concept.

QUESTION PRESENTED

Does the conduct of hiring an actor to perform sex acts (sexual intercourse,

oral copulation and sodomy) in motion picture films constitute free speech, which is protected by the First Amendment[1], which may not be regulated by government except where the film itself is also proven to be obscene under federal obscenity standards?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Article IV Section 1; First, Ninth, Tenth, Fourteenth, Rule 17.1(a), 17.1(b), and 20.4 of U.S. Supreme Court Rules; 28 USC Section 1254 (1)

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[1]This "lewd conduct-free speech" federal question "tracks" the federal question which is presently before this court in Texas v. Johnson No. 88-155, see Texas v Johnson, U.S. , 49 CCH Supreme Court Bulletin (October 17, 1988) at page 132, namely:

> "Does The Public Burning Of An American Flag During The Course Of A Political Demonstration Constitute Free Speech Subject To The Protection Of The First Amendment?"

and 1257 (3); California Penal Code Section 266 (i); California Rules of Court, Rule 24(a); 25(a), 27(a), 27(b). See Appendix K.

STATEMENT OF THE CASE

In the 24 years since this Court's decision in Jacobellis V. Ohio 378 U.S. 184, numerous efforts have been made by law enforcement to resolve the "obscene conduct-free speech" federal question left unanswered by Jacobellis; that is: "Independent of the governmental power to regulate obscene subject matter and obscene performances as a whole under the obscenity statutes, what, if anything, can be done to regulate 'conduct' which, if performed alive in three dimension, would be proscribable as a classic example of 'lewd conduct in public,' when such 'conduct' is performed by actors and recorded by still photography and on motion picture film, for commercial sale and exhibition in two dimension form

to the public?" Those efforts were made in both the civil and criminal context. In each case, this Court has avoided a resolution of this federal question on the merits. That "avoidance" has resulted in the Freeman errors.

In Jacobellis V. Ohio, 378 U.S. 184 (1964), this Court considered the "obscene conduct-free speech" federal question in a peripheral context. There, the Ohio Supreme Court considered the French film, "The Lovers," described by Justice Brennan at 378 U.S. 196 as involving "a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene..." Justice Goldberg described the film at 378 U.S. 197 as, "I have viewed the film

and I wish merely to add to my Brother Brennan's description that the love scene deemed objectionable is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed." Except for the brief scene of sexual intercourse, the film, "The Lovers" was innocuous and could have been shown on T.V. to a children's audience without cause for complaint. The Ohio Supreme Court attacked the underlying problem, insofar as it affected the State of Ohio public morals, by affirming the trial court's finding that the film as a whole was obscene, and that Jacobellis had violated the State obscenity statute. Upon appeal, this Court rejected the criminal solution posed by the Ohio Supreme Court and, in a no-clear-majority decision in which five separate opinions were filed, held

that the state criminal conviction violated the First and Fourteenth Amendments to the Federal Constitution.

The Jacobellis ruling had the effect of opening "Pandora's Box." In the 24 years that have followed Jacobellis, this Court has resisted every effort of law enforcement to clarify the extent of the civil and criminal powers of state and federal government in the "lewd conduct-free speech" debate and, thus, to close "Pandora's Box." Unfortunately, this Court's silence in major cases and reluctance to provide guidance in this public morals area has resulted in an assumption that, in the interest of free speech, this Court in this context has given "sub silentio" approval to the underlying "obscene conduct" engaged in by Harold Freeman and the "World Modeling Agency" (Jim Smith), which is so dramatically made "express" in the erroneous

legal analysis of Justice Kaufman in People of the State of California V. Harold Freeman 46 Cal.3d 419, 250 Cal. Rptr. 598 (Aug. 25, 1988).

In the 24 years that followed, at least three major efforts were made in three state jurisdictions to get this Court to undertake a review of the law enforcement powers of states within the federal question herein framed. In each case, a federal question was placed upon the docket of this Court which sought a review of state procedures and remedies which excluded the need for determining whether the film itself was obscene. Trans Lux Dist. Corp. v. The Board of Regents of the University of the State of New York (A Stranger Knocks) October Term, 1963, No. 314, 14 N.Y.2d 88, 248 N.Y.S.2d 857, 198 N.E.2d242 (Mar. 26, 1964), reversed on other grounds in 380 U.S. 259, 13 L.E.2d 959, 85 S.CT. 952

(Mar. 15, 1965); Evans Theater Corp. et al [I Am Curious (Yellow)], October Term, 1971 No. 71-89, 227 Ga.377, 180 S.E.2d 712 (Mar. 4, 1971), Petition for Writ of Certiorari to the Supreme Court of Georgia denied in 404 U.S. 950, 30 L.Ed2d267, 92 SCt. 281 (Nov. 9, 1971); A Motion Picture Film Entitled "Vixen" et al. v. State of Ohio ex. rel. Charles H. Keating, Jr., October Term, 1972, No. 71-599, 27 Ohio St.2d 278 (July 31, 1971), vacated and remanded in 413 U.S. 905, 37 L.Ed.2d 1016 (June 25, 1973), adhered to upon remand in 35 Ohio St.2d 215, 301 N.E.2d 315, 301 N.E.2d 880 (Sept. 26, 1973). In each case, this Court refused to exercise its discretion and grant a review of the "lewd conduct-free speech" federal question raised therein.

In the Trans Lux Case, supra, the film, "A Stranger Knocks", an innocuous film except for the inclusion of two scenes

of sexual intercourse had been imported to the State of New York from Sweden and lawfully passed through the U.S. Customs. The New York State Board of Review, however, refused to license the film for exhibition in the State of New York unless two scenes, involving "conduct", portraying sexual intercourse, were removed. Thus, in Trans Lux, the same issue was raised in the State of New York as was raised in the Jacobellis case in Ohio, except the New York proceedings were civil rather than criminal.

Upon appeal, the Appellate Division of the Supreme Court in 244 N.Y.S.2d 333 annuled the State Board of Regents ruling and directed a license be issued on the ground that the film was not obscene and "the sexual acts, which are implied rather than demonstrated, are an integral part of the play." On further appeal, the

Board's determination, denying a license, was reinstated in a remarkable opinion by Associate Justice Burke, speaking for the New York Court of Appeals, which carefully analyzed the principles surrounding the "lewd conduct-free speech" federal question and held that the two scenes must be deleted because, under New York law, the film involved "obscene conduct" and not free speech." Thereafter, in the jurisdictional statement seeking review by the U.S. Supreme Court, the exhibitor framed two questions based upon free speech and prior restraint. In his third jurisdictional question, he framed the more important and basic question and argued that the film has passed through customs, that it had been determined that the film "A Stranger Knocks" was not obscene, and that the state licensing provision, as applied, was invalid because

of its conflict with Section 305 of the Tariff Act of 1930. See jurisdictional statement at page 5. Instead of noting jurisdiction and answering the third and fundamental substantive question, this Court avoided that issue, chose instead to review the procedural question raised in Freedman V. Maryland 380 US 51, 13LEd2d 649, 85 SCt.734 (Mar. 1, 1985), and thereafter reversed the Trans Lux judgment on the procedural issue decided in Freedman V. Maryland. See Trans-Lux Dist. Corp. V. Board of Regents of the University of New York 380 US 259, 13LEd2d 959, 85 SCt.952 (March 15, 1965).

In the Evans Theatre Corp. case, supra, the Fulton County Georgia District Attorney brought a civil action to injoin the exhibition of the film, "I Am Curious (Yellow)" as an obscene film and a public nuisance. The film, "I Am Curious (Yellow)", an import from Sweden, also was an innocuous

film, depicted two hours of political propaganda and also included several momentary displays of sexual intercourse of very brief duration. After an immediate hearing on a motion for a preliminary injunction and viewing of the film, the trial court issued a preliminary injunction, on the grounds that the film violated the Georgia obscenity statute. Thus, the Georgia Supreme Court ruling that the film violated the state obscenity statute was similar to the Ohio Supreme Court ruling that Jacobellis violated the state obscenity statute, except that, in the Georgia situation, the federal question was raised in a civil, rather than a criminal proceedings.

On appeal to the Georgia Supreme Court, the People cited and relied largely upon the principles expressed by Associate Justice Burke in his analysis in Trans Lux supra. In its opinion upholding the in-

junction against such exhibition, the Georgia Supreme Court did not cite Trans Lux but did, however, apply the Trans Lux principles. See Evans Theatre Corp. v. Lewis R. Slaton 180 SE2d 712 at 715 where the Court noted that there was little difference in the effect on the public between lewd conduct in public areas and lewd conduct in films shown to the public. When the Evans Theatre Corp case was brought to this Court in a petition for Writ of Certiorari, this Court once again exercised its discretion and refused to hear and decide the all important "lewd conduct-free speech" federal question which has been and is being exploited by the pornographic industry to its great advantage. Evan's Theatre Corp. et al. v. Slaton 404 U.S. 950, 30 LEd2d 267, 92 SCt.281 (Nov. 9, 1971). Although this Court declined to grant a hearing

on the remedy applied by the Georgia Supreme Court against one of the most controversial films brought before this Court ["I Am Curious (Yellow)"], it did see fit later to refer obliquely to that case, and cite with approval that procedure and result. See Paris Adult Theatre I V Slaton 413 US 49 at 54-55 (June 21, 1973). Ironically, the Evans Theatre case was also cited with approval by the California Supreme Court in its decision in People ex rel Busch V. Projection Room Theater 17 Cal.3d 42, at 54-55 130 Cal.Rptr.328 at 335 (June 1, 1976), in which the California Supreme Court impliedly adopted the above stated Trans Lux principles which were used by the Georgia Supreme Court to resolve the "lewd conduct-free speech" federal question in the Evans Theater Corp. case. The California Supreme Court's analysis

in the Projection Room Theater case is at odds with its analysis in People of the State of Calif. V. Harold Freeman

In Ohio Ex. Rel. Charles H. Keating, Jr. V. Vixen et al., supra, a private citizen, on September 22, 1969, brought a civil public nuisance abatement action to enjoin the exhibition of Russ Meyer's Film, "Vixen." "Vixen" was a transitional film in the unresolved 24 year "lewd conduct-free speech" controversy which began with this Court's decision in Jacobellis V. Ohio and strong State opposition to relatively innocuous films like "The Lovers," "A Stranger Knocks" and "I Am Curious (Yellow)" and presently allows neighborhood sales and exhibition of patently hard-core pornographic video tapes like "Caught From Behind II" in Freeman and the seven-day-a-week national broad-

cast and exhibition of patently hard-core films on Satellite T.V. with little state opposition in the California Supreme Court. Among the latter are re-runs of hard-core films showing Petitioners' deceased daughter Colleen Applegate, AKA Shauna Grant, in lewd conduct on the screen. As to this, see "Motion of Phil Applegate and Karen Applegate for leave to film brief amicus curiae" in Fort Wayne Books, Inc. v. Indiana Oct. Term 1987, No. 87-470 at Appendix A-1 through A-52 and B-1 through B-29. After a trial on the merits, the Hamilton County Common Pleas Court enjoined the exhibition of "Vixen" as an obscene film in violation of the Ohio State obscenity and public nuisance statutes.

On appeal, the Ohio Supreme Court, in direct conflict with the California Supreme Court in Freeman refused to

adjudicate the question whether "Vixen" was obscene as a whole and, instead, enjoined its exhibition on the ground that the exhibition of "lewd conduct" on the screen was a public nuisance which equity can and must enjoin.

When the "Vixen" case was appealed, this Court responded in the same fashion and, once again, refused to hear and resolve the critical "lewd conduct-free speech" federal question which has provided an "excuse" for the Harold Freeman and "World Modeling Agency" (James South) Enterprises. See A Motion Picture Film Entitled "Vixen" et al. v. State of Ohio Ex. Rel. Charles H. Keating, Jr. 413 U.S. 905, 37LEd2d 1016 (June 25, 1973), vacating and remanding Ohio Ex. Rel. Charles H. Keating, Jr. v. "Vixen" et al. 27 Ohio St2d 278 (July 31, 1971), adhered to upon demand in 35 Ohio ST2d 215, 301

NE2d 215 (Sept. 26, 1973). In a "Petition for Rehearing" filed on July, 1973, Appellee Ohio Ex. Rel. Charles H. Keating, Jr. again focused upon Associate Justice Burke's anaysis in the Trans Lux case and requested that the judgment of the Ohio Supreme Court be re-examined and affirmed on the merits in accordance with the principles expressed by this Court in U.S. v. 12-200 ft. Reels of Super 8 mm Film. See pages 3-9 of "Motion to Affirm" and 3-11 of "Petition for Rehearing", copies of which appear at Appendix G and H to this Petition. That Petition was denied in 414 U.S. 881, 38 L Ed 2d 128, 94 SCt. 27 (October 9, 1973).

The Ohio Supreme Court's analysis is still controlling law in the State of Ohio. Petitioners submit that the California Supreme Court's analysis of the federal issue in People of the State of California v. Harold Freeman;

namely, that a state's regulatory controls may not be exercised independently of the obscenity issue is at complete variance with the Ohio Supreme Court's analysis in the "Vixen" case and is grounds for granting this Petition. See Rule 17.1 (b) of Rules of the U.S. Supreme Court.

In the face of the law enforcement problems which arose as a result of this Court's unwillingness to address the federal question in the "lewd conduct-free speech controversy" and the principles expressed by New York Associate Justice Burke in the Trans Lux case, the judiciary in the State of California (where the majority of hard core pornographic films and subject matter is produced) responded to "prodding" at the insistence of the Los Angeles Administrative Vice which developed numerous test cases. In these test cases,

the California Judiciary analyzed the operations of the "World Modeling Agency" (James South) and Harold Freeman and similar activities and fashioned a state criminal remedy by acknowledging that the "conduct" involved in the hiring of actors to perform sex acts in motion picture films was, in fact, a form of prostitution, independent of the state criminal obscenity statute; i.e., a violation of its "pandering" statute, Calif. Penal Code Sect. 266 (i) See Associate Justice Arguelles concurring opinion below in People of the State of California V. Harold Freeman 233 Calif.Rptr. 510 at 511. (See Appendix B-5 through B-7).

I concur.
People V. Fixler (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, and People ex. rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, have unequivocally held that sexual intercourse for hire by models whose

activity is photographed for publication is prostitution. Fixler specifically approved the use of Penal Code section 266i to prosecute a phtoographer and a photo editor of a pornographic firm for the hiring of a young female, for photographic purposes, to engage in lewd acts and sexual intercourse with another male. There is no essential difference between the taking of still photographs for publications and filming for the production of motion pictures.

The dissent interprets Barrows v. Municipal Court (1970) 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483, as clothing the defendant with First Amendment protection from prosecution under California's common pandering statute. Yet a unanimous court of our own District in Fixler cites Barrows as authority for a different principle of law, stating: "The California Supreme Court held in Barrows v. Municipal Court..., that acts which are independently prohibited by law cannot be consummated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing material which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]" (People v. Fixler, supra, 56 Cal. App.3d at p.6, 128 Cal. Rptr. 363.)

"The prosecution [for violating section 266i] here was based on

> conduct and was not aimed at prohibiting any communication of ideas. The manner of obtaining the photographs and the ultimate use to which those photographs might be put are separate and unrelated issues. While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which the material was originally obtained, where a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it." (People V. Fixler, supra, 56 Cal.App.3d at pp. 325-326, 128 Cal.Rptr. 363.)

The rationale for that development in California Criminal Law is set forth in Associate Justice Arguelles' dissent in People of the State of California V. Harold Freeman 234 Cal.Rptr. 245 at 247 (See Appendix C-10 through C-13).

> I respectfully dissent.
> In 1976, this appellate district held that, "The purpose of the anti-pandering statute (Pen.Code, § 266i) is to '...cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively

combating the evil sought to be condemned.' [Citations.]" (People v. Fixler (1976) 56 Cal. App. 3d 321, 327, 128 Cal.Rptr. 363.)

Engaging in the process of inductive reasoning to ascertain just what "evil" the anti-pandering statute seeks to condemn, we can trace that evil from the statute's language. "The term 'procure,' as it is used in the statute with relation to the crime of pandering, has a very definite and well understood meaning. A procurer is one who exploits the virtue of a female by soliciting trade for a lewd and lascivious woman to gratify the lusts of other persons. A procurer is an agent who promotes prostitution. [Citations.] The result of soliciting patronage as the agent of a depraved woman is equally harmful to society whether the procurer carries on his loathsome trade with or without her consent." (People v. Cimar (1932) 127 Cal.App. 9, 13, 15 P.2d 166, emphasis added.)

As far as the Legislature and the courts are concerned, the evils of promoting prostitution did not change between the time People V. Cimar, supra, 127 Cal. App. 9, 15, P.2d 166 was decided and the time People v. Fixler, supra, 56 Cal.App.3d 321, 128 Cal.Rptr. 363, was decided 44 years later, just as the Legislature's three amendments to the anti-pandering statute in the 10 years that have passed since Fixler was decided have not specifi-

cally excepted still picture photographers or photo editors (or movie producers) from those who are subject to prosecution and conviction for pandering under the statute just because they are snapping pictures or rolling film.

While the "evil" to be condemned has not changed, the form of the promotion (of prostitution) and exploitation (of others' virtue for lustful gratification) has changed. When Cimar was decided, the "evil" usually took form in houses of prostitution (see Pen. Code, § 266i, subds. (c), (d); as the court there concluded, "the legislature evidently intended to discourage the nefarious business of replenishing houses of prostitution with inmates." (People v.Cimar, supra, 127 Cal.App. at p. 14, 15 P.2d 166.) Now, however, the "evil" may also take the form of celluloid film or magnetic videotape of sex acts, performed for money, that can be played and replayed in movie theatres and on home video cassette players. I do not, however, believe that this change in form has changed the nature of the promotion and exploitation involved. One need look no further than count II here to see that the defendant promoted the prostitution of, and exploited, the owner of the residence where the filming occurred, a woman who had no acting experience and considered herself naive but had a desire or fantasy to be an "act-

> ress." Defendant promoted the loss of, and exploited, her naivete in the gratification of others' lust through the medium of filmed sexual acts by employing her to engage in various sexual acts including intercourse before the camera, for which he paid her $200.00. Such on-location recruiting of neophytes is the same "nefarious business of replenishing," with respect to an industry which exploits the performance of sex acts for money, that the Cimar court found the Legislature intended to discourage with respect to houses of prostitution. Then, as now, the person's consent is immaterial.

During that same period, the United States Attorney for the Western District of Missouri applied Justice Burke's analysis in Trans Lux and the analysis in People V. Fixler, supra, described by Justice Arguelles, above in Freeman, supra, and brought a criminal Mann Act prosecution against John Victor Roeder for transporting a female across state lines for the purpose of participating in various sexual acts for hire for the purpose of producing a movie

depicting these acts. In United States v. Roeder 526 F.2d 736, the United States Court of Appeals for the Tenth Circuit (Hill, Seth and Doyle) upheld the U.S. Attorney's analysis and affirmed the conviction of a Mann Act violation, independent of the question whether the film itself was, in fact, obscene.

In the absence of a definitive resolution by this Court of the underlying "lewd conduct-free speech" federal question which Jacobellis V. Ohio, supra, spawned, the Los Angeles modeling "business" conducted by "World Modeling Agency" (James South) has openly flourished, presumably in expectation that the rule of law expressed in People v. Fixler (1976) 56 Cal.App.3d 321 and People of the State of California ex. rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523 at 529 and U.S. V. Roeder 526 F2d

736 would ultimately be overruled by a majority of the justices as this Court's membership changed.

The extent of Jim South's flourishing "modeling" trade is recited in Justice Kaufman's opinion, speaking for the California Supreme Court below. See Appendix A-4 through A-5 and the video tape copy of the PBS documentary, "Death of a Porn Queen" reporting on the background and death of Colleen Applegate, Petitioners' daughter, at age 20, filed with this Court, as exhibit 6 to Petitioners' brief amicus curiae filed in Fort Wayne Books, Inc. v. Indiana No. 87-470. See also Appendix D-3 through D-4 to this petition. It was during this flourishing period of 24 years of hard core pornographic motion picture production, that Colleen Applegate, at age 18, made the mistake of leaving the shelter

of her family and home in Farmington, Minnesota to enter the modeling business in Los Angeles, in her determination to be someone. There she fell prey to the seductive promises of Jim South's "World Modeling Agency." Today that unlawful business and moral public nuisance continues to operate -- due to the erroneous analysis and largesse of Associate Justice Kaufman which overruled Freedman's conviction.

Petitioners contend that that portion of Associate Justice Kaufman's opinion which analyzes the "lewd conduct-free speech" federal question, and concludes that "lewd conduct," such as that which appears in "Caught From Behind II" is protected conduct when placed on film, and cannot be proscribed without a determination that such films are obscene as a whole is shown to be patently in error when subjected to

the fundamental principles and clear logic of Justice Burke's opinion in Trans Lux and other cases which were never placed before the California Supreme Court either in the briefing or oral argument of the California Attorney General. The unanimity of the California Justices in Freeman, supra, can be attributed to the latter fact. See here, at Appendix I, the news article dated December 11, 1987, in the Los Angeles Times, which reported on the oral arguments. That Court was misled by the failure of the People to respond to the questioning of Justice Kaufman and Panelli with the Trans Lux principles.

The unanimity of the California Justices in Freeman and the decision of the Attorney General, representing the People of the State of California not to argue the Trans Lux principles

and not to petition this Court for review must also be attributed to the silence of this Court during the past 24 years and its failure to reaffirm the fundamental principles and values expressed in Justice Burke's analysis and the opinions set forth above.

When Petitioners' attorney was informed that the analysis of Associate Justice Burke in Trans Lux had not been placed before the California Supreme Court and became aware that the Attorney General of the State of California might not petition for a rehearing because the decision of the California Supreme Court was unanimous, he filed a timely motion on Sept. 9, 1988, the latter portion of which asked the Court on its own motion, to reexamine the issues in the light of Judge Burke's Trans Lux analysis (see arguments at Appendix D to this petition). There-

after, such motion was considered by the Court on Sept. 14, 1988 which extended its jurisdiction to Oct. 24, 1988 to permit the Court to consider Petitioners' motion. On Oct. 21, 1988, the California Supreme Court filed its order (see Appendix E) which denied the Petitioners' motion which requested the Court to grant a rehearing on its own motion. Petitioner contends that the Court's consideration of such motion qualifies Petitioners as "intervenors" below and thus "parties," who are authorized to file this petition for a Writ of Certiorari under Rule 20.4 of the Rules of the United States Supreme Court. Only a "party" to the proceeding can make a motion therin. Difani V. Riverside County Oil Co. (1927) 201 Cal. 210, 214, 6 Witkin, California Procedure (Third Edition) at page 329. See also, Stern, Gressman and Shapiro, Supreme Court

Practice (Sixth Edition) at pages 338-342, §6.16, "What Parties May Petition for Certiorari - Intervention in the Supreme Court"; pp. 44-47, §2.4 Invocation of Certiorari Jurisdiction by "any party" to case below. See, also, Forms at pp. 855-860 based upon Hunter V. Ohio Ex. Rel. Miller 396 US 879 (1969).

REASONS FOR GRANTING INTERVENTION AND THE WRIT OF CERTIORARI

1. THE FIXLER CRIMINAL REMEDY IS CRUCIAL TO OBSCENITY LAW ENFORCEMENT. FIXLER MUST BE REHABILITATED AS A LAW ENFORCEMENT WEAPON.

The criminal remedy which was applied in People of the State of California v. Harold Freeman, supra, has long been a part of California law, having been tested and upheld in People v. Fixler 56 Cal.App.3d 321, 128 Cal.Rptr. 363

(Mar. 17, 1976, hearing denied May 14, 1976). See the comments of Associate Justice Arguelles in the Court of Appeal below, set forth at pages 25 through 30 supra. Beyond doubt, it is the most important weapon in the arsenal of weapons possessed by law enforcement. The manner in which the statute functions, as demonstrated by the trial facts below, has a deterrent effect on "production" that is devastating to the daily operations of the hard-core pornographic trade. It is not an exaggeration to assert that, properly implemented, it has the capacity for driving hard-core pornographic "production" back underground where it belongs. The detrimental effect of reversing Fixler cannot be overemphasized. Not only will it preclude the use of this remedy in California, where most of the hard-core pornography is produced, but it also will cast a

doubt over its validity and deter other centers of production from adding it to their arsenal of weapons.

The adverse effect that the California Supreme Court's erroneous analysis of the "lewd conduct-free speech" federal question in People of the State of California v. Harold Freeman et al., supra, will have, as precedent, on law enforcement efforts across this country, requires that this Court assume jurisdiction and correct such error in a timely fashion. This Court's failure to timely correct such error will only magnify the harm caused by this Court's 24 years of silence on this issue, as set forth above in the Statement of the Case.

One example of the deleterious effect, is the recent reliance in a Minnesota case, State of Minnesota v. Robert Walter Bonynce, Fourth Judicial District Court, Division Four, Edina,

County of Hennepin in Point I of a defense attorney's "Memorandum of Points and Authorities in Support of Defendant's Motion" to dismiss five separate gross misdemeanor counts which allege violations of the Minnesota Bestiality Statute incident to the production of a video tape involving sexual intercourse with a Rotweiller dog. A copy of that argument is set forth at Appendix J.

Further, if the Freeman decision is allowed to stand on the federal question, it will undercut the rudimentary principles which permit the Mann Act to be invoked when the producers of such films transport such actors across state lines in the production of such films. See U.S. v. Roeder 526 F2d 736 at 737, 738 (10th Cir 1975). Justice Kaufman's erroneous analysis, if allowed to stand, will affect the discretion of many U.S. Attorneys, who will refuse

to authorize such federal charges when prepared by law enforcement personnel, notwithstanding Justice Kaufman's efforts to distinguish the Roeder case, based upon the shadow of doubt generated by his faulty analysis.

2. CALIFORNIA PENAL CODE SECTION 266 (i) IS CONSTITUTIONAL ON ITS FACE

Associate Justice Kaufman was clearly in error in his analysis, see People v. Freeman 250 Cal.Rptr. 598 at 602-603, Footnote 6, that First Amendment considerations...compel the conclusion that People v. Fixler, supra was wrongly decided and must be reversed. The basic constitutional principles expressed by New York Associate Justice Burke in Trans Lux Dist. Corp. v. Board of Regents 248 NYS2d 857 (1964) and Justice Arguelles, speaking in the court below in People v. Freeman 233 Cal.Rptr. 510

at 511, demonstrate the contrary. See Petitioners' argument at pages 8 through 19 of their brief, filed with their motion in the California Supreme Court on Sept. 12, 1988, a copy of which appears herein at Appendix D-15 through D-37 to this petition. Further, this is not a case where this Court should defer to lower court constructions of state statutes, see Frisby v. Schultz 487 U.S._____ 101 LEd2d 420 at 430, 108 SCt _____June 27, 1988, where this Court construed the picketing "ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited." If necessary, the "lewd conduct" within the ambit of the statute could just as easily be limited to the type of hard-core sexual conduct engaged in by the producers of "Caught From Behind II" (see time and motion study of "Caught From Behind

II", filed with this Court as Exhibit 1 to this petition), and any hard core sexual conduct which is "claimed" as being outside such proscription, such as that described in the Los Angeles Times article dated Nov. 18, 1987, appearing at Appendix I-5, I-6 can be urged as an affirmative defense which is suggested by the Model Penal Code for the obscenity crime.

3. CALIFORNIA PENAL CODE SECTION 266 (i) IS CONSTITUTIONAL AS APPLIED TO THE PRODUCTION OF THE FILM "CAUGHT FROM BEHIND II"

In his analysis in Freeman, supra, at page 602-603, Justice Kaufman holds that California Penal Code Section 266 (i) cannot constitutionally be applied to the production of the film "Caught From Behind II". (See Appendix A-11 through

A-12). The trial court facts clearly demonstrate the contrary. See, in this regard, the copy of the time and motion study of the film "Caught From Behind II," filed with this Court as Exhibit 1 to this Petition. The original time and motion study was filed with the California Supreme Court on Sept. 12, 1988 as Exhibit 6 to Petitioners' motion, (see Appendix D at page D-7)

4. RULE 17.1 (b) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN

Rule 17.1 (b) of the Rules of the U.S. Supreme Court supports the granting of the Petition for Writ of Certiorari herein. The California Supreme Court decided the above stated "lewd conduct-free speech" federal question in a way which is in direct conflict with the

opinions of the Ohio Supreme Court in A Film Entitled "Vixen" et al. v. State of Ohio Ex. Rel. Charles H. Keating, Jr., supra, the New York Court of Appeals in Trans Lux Distributing Corp. v. Board of Regents of the University of the State of New York, supra, and the Georgia Supreme Court in Evans Theater Corp. et al. v. Lewis R. Slaton supra, as set forth above in the Statement of the Case.

5. RULE 17.1 (b) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETTION FOR WRIT OF CERTIORARI HEREIN

Rule 17.1 (b) of the Rules of the U.S. Supreme Court supports the granting of the Petition for Writ of Certiorari herein. The California Supreme Court decided the above "lewd conduct-free speech" federal question in a way which

is in direct conflict with the opinion of the U.S. Court of Appeals for the 10th Circuit in U.S. v. Roeder 526 F2d 736 (1975), cert denied by this Court in 426 US 905.

6. RULE 17.1 (a) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN

Rule 17.1 (a) of the Rules of the U.S. Supreme Court supports the granting of the Petition for Writ of Certiorari herein. The above stated "lewd conduct-free speech" federal question has been on the docket of this Court for the past 24 years in both manditory appeals and discretionary petitions for Writs of Certiorari, and has not yet been, but should be, settled by this Court a timely fashion at this time. Further,

substantially the same federal question is presently before this Court in the grant of a Petition for Certiorari in Texas v. Johnson _____US_____, see also, 49 CCH Supreme Court Bulletin at page 132.

7. THE EQUITY PRINCIPLES UNDERLYING THE PRIVATE ATTORNEY GENERAL CONCEPT AT THE TRIAL LEVEL SUPPORT THE FILING AND GRANTING OF THIS PETITION FOR WRIT OF CERTIORARI HEREIN AT THE APPELLATE LEVEL

The equity principles underlying the modern private attorney-general concept, which authorize the filing of a lawsuit to "vindicate a policy which is considered to be of the highest priority," see County of Inyo v. City of Los Angeles 78 Cal.App.3d 82 at 89, fN1, 144 Cal.Rptr. 71, at 75 footnote 1 Newman v. Piggie Park Enterprises 390

US 400 at 401 Footnote2, should apply with equal force at the appellate level so as to authorize this filing of a petition for Writ of Certiorari, as a private attorney general, where such filing will "vindicate a policy which is considered to be of the highest order"; alternatively, this Court should consider inviting the law enforcement officials named as real parties in interest herein to file responses expressing the views of the state and federal governments relative to both the Petitions to Intervene and for Writ of Certiorari. See Stern, Gressman and Shapiro, Supreme Court Practice (Sixth Edition) at page 47 footnote 1.

8. RULE 20.4 OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE FILING AND GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN.

Petitioners have standing under Rule 20.4 to seek review of the "lewd conduct-free speech" because they were parties in intervention below, based upon the California Supreme Court's consideration of their motion. Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 214; 6 Witkin, Calif. Procedure (Third Edition) at page 329; Rule 20.4 of the Rules of the U.S. Supreme Court; 28 USC §1257 (3).

Further, the interests of justice require that Petitioners be admitted as parties or as intervenors for the first time at the Supreme Court level because of the adverse effect such erroneous judgment will have on their present efforts to put an end to the nationwide broadcast of "reruns" on Satellite T.V. of similar patently offensive sexual conduct performed by their deceased daughter, Colleen Applegate, aka Shauna

Grant during the years 1982-1984 in films for Respondent's co-conspirator, "World Modeling Agency" (Jim South) under the aegis of this erroneous rule of federal law. The seduction of Colleen by World Modeling Agency was made possible by this Court's 24 years of "silence" and avoidance of the underlying "lewd conduct-free speech" federal question. The sub-silentio rule of federal law which provided the aegis for Freeman and others has now been made express by the California Supreme Court in Freeman. During the past year, Petitioners have sought the assistance of New York and California state and federal attorneys, and the U.S. Attorney General to enjoin the successive satellite T.V. reruns of their deceased daughter's 29 hard-core pornographic films produced by the porno industry during 1982-1984, both on the grounds: (1) that such films are obscene

and in violation of state and federal obscenity and conspiracy statutes, U.S. v. Sandys et al. 605 F2d 210 (CA6th 1979) Cert. denied in Gordon v. U.S., and Friedlander v. U.S. 444 U.S. 984 (Dec. 3, 1984), and on the grounds, (2) that such films may be enjoined independent of the obscenity laws under the principles of law expressed in Trans Lux Distributing Corp. v. Board of Regents, supra, Evans Theater Corp. et al. v. Slaton, supra, Ohio ex. rel. Keating v. Vixen supra, and U.S. v. 37 Photographs 402 US 363 at 377. The past reluctance of federal authorities to act by way of injunction because of this Court's silence has recently been effectively offset by the new tools given by Congress to federal authorities in its recently enacted federal legislation in November of 1988 on satellite and cable T.V. and the interaction of those

new statutes on the use of the federal injunction allowed by 19 USC section 1305(a) and U.S. v. 37 Photographs. Petitioners will be further harmed in their efforts to stimulate such law enforcement officials to action upon the "conspiracy" theory set forth in Sandys supra, if the Freeman decision is allowed to stand.

CONCLUSION

In his concurring opinion in Pope v. Illinois 491 US ____, 95 L.Ed.2d 439 at 447-448, Justice Scalia suggested a need for reexamination of Miller v. Calif. 413 US 15, 37 L.Ed.2d, 419 (1973). Petitioners submit that the trial facts and "lewd conduct-free speech" federal question raised herein present an ideal background for such a reexamination.

The criminal remedy which was applied in the Trial Court in People of the State of California v. Harold Freeman has long been a part of California law, having been

tested and upheld in People v. Fixler 56 Cal.App.3d 321, 128 Cal.Rptr. 363 (Mar. 17, 1976, hearing denied May 14, 1976). The manner in which Fixler functions provides a major deterrent to the business operations of the producers and manufacturers of visual hard-core pornography. Properly implemented, this law enforcement weapon has the capacity for driving all visual hard-core pornography production back underground where it existed 30 years ago (circa 1957).

Because the Fixler criminal remedy is crucial to law enforcement in the centers of production and manufacture, Fixler must be rehabilitated by this Court accepting jurisdiction over Freeman, and setting this basic "lewd conduct-free speech" federal question for argument in tandem with Texas v. Johnson No. 88-155.

The California Supreme Court's opinion is predicated upon that Court's misunderstanding as to the extent of a state's

powers in this "lewd conduct-free speech" controversy. Three state Supreme Courts (New York, Ohio and Georgia) and one Court of Appeals (10th Circuit) have analyzed the same issue and arrived at a contrary answer. This Court should resolve this federal controversy and, thereafter, remand Freeman for further reconsideration by the California Supreme Court.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 1988, the original and 40 copies of the within Petition For Leave To Intervene And Petition For Writ Of Certiorari To The Supreme Court of California and 10 copies of Exhibit 1 thereto, were deposited in the United States Post Office in Van Nuys, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies and one copy of exhibit 1 thereto were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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APPENDIX A

OPINION OF CALIFORNIA SUPREME COURT IN PEOPLE V. HAROLD FREEMAN 46 Cal. 3d 419 (AUG. 25, 1988) REVERSING ON FIRST AMENDMENT GROUNDS, THE RULE OF LAW EXPRESSED IN 1976 IN PEOPLE V. FIXLER, AND RESOLVING THE "LEWD CONDUCT-FREE SPEECH" FEDERAL QUESTION IN A MANNER CONTRARY TO THAT OF THE NEW YORK, OHIO, AND GEORGIA SUPREME COURTS AND THE TENTH CIRCUIT COURT OF APPEALS.

eference: Motion For Leave to Intervene and Petition for Writ of Certiorari, at pages 2, 32, and 43)

The PEOPLE, Plaintiff and Respondent,

v.

Harold FREEMAN, Defendant and Appellant.

No. S000070.

Supreme Court of California, In Bank.

Aug. 25, 1988.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of pandering, and he appealed. The Court of Appeal, 233 Cal.Rptr. 510, affirmed. The Supreme Court granted review, superseding opinion of Court of Appeal. The Supreme Court, Kaufman, J., held that: (1) defendant did not "procure another person for the purpose of prostitution" within meaning of pandering statute when he hired and paid actors to perform in nonobscene commercial film which portrayed sexually explicit acts, and (2) First Amendment precluded application of pan-

dering statute to hiring of actors to perform in production of nonobscene motion picture which portrayed sexually explicit acts.

Reversed.

Lucas, C.J., and Eagleson, J., concurred in judgment.

1. Prostitution ⇐1

Defendant did not procure another person for purpose of prostitution within meaning of pandering statute when he hired and paid actors to perform in nonobscene commercial film which portrayed sexually explicit acts, absent evidence that defendant paid acting fees for purpose of sexual arousal or gratification of himself or actors. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Penal Code § 266i.

2. Constitutional Law ⇐90.1(6)
Prostitution ⇐1

First Amendment precluded application of pandering statute to hiring of actors to perform in production of nonobscene motion picture which portrayed sexually ex-

plicit acts. West's Ann.Cal.Penal Code § 266i; U.S.C.A. Const.Amend. 1.

Stuart Goldfarb and Dennis A. Fischer, Santa Monica, for defendant and appellant.

John K. Van de Kamp, Atty. Gen., Steve White, Chief Asst. Atty. Gen., Mark Alan Hart, Robert R. Anderson and Lauren E. Dana, Deputy Attys. Gen., for plaintiff and respondent.

KAUFMAN, Justice.

Defendant Harold Freeman hired and paid actors to perform in a nonobscene commercial film which portrayed sexually explicit acts. On that account he was charged with and convicted of five counts of pandering—procurement of persons "for the purpose of prostitution"—under Penal Code section 266i. He appealed contending his conduct did not constitute the crime of pandering. The Court of Appeal affirmed the judgment of conviction.

This court granted review because of First Amendment concerns and the state-

wide significance of the issues. Because of the language of the statutes involved and because construction of the pandering statute to make it applicable to the hiring and payment of actors to perform in a nonobscene motion picture would unlawfully impinge upon protected First Amendment rights, we are compelled to conclude the pandering statute was not intended to and does not apply to the conduct here involved and that defendant's convictions of pandering must be reversed.

I. FACTS

Defendant Freeman is the president of Hollywood Video Production Company (Hollywood Video), which is in the business of producing and marketing "adult" films. In September 1983 defendant produced and directed a film called "Caught from Behind, Part II." Defendant hired actors and actresses to perform in the film. As part of their roles, the performers engaged in various sexually explicit acts, including sexual intercourse, oral copulation and sodomy.

All the filming was done in the private residence of Nancy Conger, and was not open to the public. Conger was paid for the use of her home in the making of the film. She also asked if she could act in the film. Defendant agreed Conger could be in the film. With the exception of Nancy Conger, all the actors and actresses in the film were cast through the World Modeling Agency operated by Jim South. Defendant paid each actor for his or her performance in the film, and paid an additional fee to South for each performer from World Modeling Agency who had been cast for a role in the film.

Defendant was charged with five counts of pandering (Pen.Code, § 266i) based on the hiring of five actresses who performed sex acts in the film.[1] Defendant was not charged with any violation of the obscenity laws (Pen. Code, § 311 et seq.) in connection with production or distribution of the

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1. Although both male and female actors were hired and paid and although both participated in the sexually explicit conduct, the criminal charges were based solely on the conduct of the female actors.

film and there was no determination the film was obscene.[2]

After a jury trial, defendant was found guilty on all five counts. Defendant was placed on five years probation[3] and ordered as conditions of probation to serve 90 days in the county jail and pay restitution of $10,000 under Penal Code section 1203.-04 and a $100 restitution fine under Government Code section 13967, subdivision (a).

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2. All further statutory references are to the Penal Code unless otherwise stated.

3. Section 1203.065 prohibits the granting of probation for a conviction of pandering. The trial court found, however, that imposition of a prison term would constitute cruel and unusual punishment for defendant's conduct and placed defendant on probation notwithstanding section 1203.065. The People appealed the granting of probation, which was affirmed by the Court of Appeal. Review of that decision is pending in this court in a separate proceeding (S000319, review granted Apr. 16, 1987). In view of our conclusion the judgment of conviction must be reversed because the conduct did not constitute pandering, the review of the probationary sentence will become moot.

II. DISCUSSION

The issues and contentions in this case and their resolution are pervaded by a central fact. The film was not determined to be obscene and for purposes of this review must be deemed to be not obscene. Thus the prosecution of defendant under the pandering statute must be viewed as a somewhat transparent attempt at an "end run" around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort.

A. *The Statutory Language*

[1] The pandering statute under which defendant was convicted provides in pertinent part: "Any person who: (a) procures another person for the purpose of prostitution ... is guilty of pandering, a felony...."[4] (§ 266i.)

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4. Section 266i reads in full as follows: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises,

"Prostitution" is not defined in section 266i. Rather, the definition of "prostitution" derives from Penal Code section 647,

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threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

subdivision (b): "'[P]rostitution' includes any *lewd act* between persons *for money or other consideration*." (Italics added.)

The People argue that the actors and actresses in the film engaged in acts of prostitution—i.e., sexual acts for money—because they performed the acts before the movie cameras "for the money they received." Thus, the People argue, defendant was guilty of procuring the actors "for the purpose of prostitution." The People's syllogism is flawed in significant regards.

First, the definition of "prostitution" (and ultimately, therefore, the definition of "pandering") depends on the definition of a "lewd act." In *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636 this court construed the term "lewd conduct" for purposes of prosecution under section 647, subdivision (a), proscribing lewd or dissolute conduct in a public place, a provision related to the prohibition against prostitution contained in section 647, subdivision (b). In *Pryor* we held that a "lewd act" requires "touching of the genitals, buttocks, or female breast *for the purpose of sexual arousal, gratification,*

annoyance or offense...." (Italics added. *Id.*, at p. 256, 158 Cal.Rptr. 330, 599 P.2d 636.) The definition of a "lewd act" for purposes of section 647, subdivision (b) evolved from *Pryor* and was applied to "prostitution" in *People v. Hill* (1980) 103 Cal.App.3d 525, at pages 534–535, 163 Cal. Rptr. 99 as follows: '[F]or a 'lewd' or 'dissolute' act to constitute 'prostitution,' the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*" (Italics added.)

One contention of defendant is that requisite to the crime of prostitution is the existence of a "customer" and there being no "customer" here, no prostitution was involved and therefore no procurement for purposes of prostitution and no pandering. We find it unnecessary to address that contention. Whether or not prostitution must always involve a "customer," it is clear that in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*

The payment of acting fees was the only payment involved in the instant case. This payment was made to the actors for performing in a nonobscene film. There is no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors'. Defendant, of course, did not himself participate in any of the sexual conduct. Defendant, the payor, thus did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution.[5]

B. *First Amendment Considerations*

[2] However, even if defendant's conduct could somehow be found to come within the definition of "prostitution" literally, the application of the pandering statute to

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5. There is also something tautological in the argument that the very acting fees by which defendant "procured" the actors ("for the purpose of prostitution") *also* constitute the payment necessary to establish the "prostitution" for which the actors are assertedly being "procured."

the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values.

It is the duty of this court in construing a statute to ascertain and give effect to the intent of the Legislature. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 366, 90 Cal.Rptr. 592, 475 P.2d 864; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1979) 88 Cal.App.3d 43, 53, 152 Cal.Rptr. 153.) And it is fundamental that the Legislature will not be presumed to intend unconstitutional results. (*People v. Smith* (1983) 34 Cal.3d 251, 259, 193 Cal.Rptr. 692, 667 P.2d 149; *In re Kay* (1970) 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 464 P.2d 142.) "[W]here '"the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution."' [Citations.]" (*People v. Davenport* (1985) 41 Cal.3d 247, 264, 221 Cal. Rptr. 794, 710 P.2d 861; accord: *United States v. Delaware & Hudson Co.* (1909)

213 U.S. 366, 407–408, 29 S.Ct. 527, 535–536, 53 L.Ed. 836.)

Regardless of our view of the social utility of this particular motion picture, our analysis must begin with the premise that a nonobscene motion picture is protected by the guarantee of free expression found in the First Amendment. (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 502, 72 S.Ct. 777, 780, 96 L.Ed. 1098; *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 689, 68 Cal.Rptr. 721, 441 P.2d 281; *Flack v. Municipal Court* (1967) 66 Cal.2d 981, 988, 59 Cal.Rptr. 872, 429 P.2d 192; *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 824, 83 Cal.Rptr. 819, 464 P.2d 483.)

In *Barrows v. Municipal Court, supra*, 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483 this court considered the applicability of criminal penalties under the vagrancy law, section 647, subdivision (a), to the live performance of a play in a theater before an audience. Although the opinion does not detail precisely what occurred, two performers, the producer and the director of the play apparently were prosecuted on account of sexually related conduct that

occurred during the performance of the play.

We first noted that performance of a live play comes within the same First Amendment protection as motion pictures. The vagrancy law there at issue, section 647, subdivision (a), with its attendant requirement of lifetime registration as a sex offender, was allied to other sections prohibiting various kinds of sexual misconduct. Nothing in its history or context suggested that it was intended to apply to theatrical performances that came within the ambit of the First Amendment. The criminal penalties of the statutes there at issue, if applied to a live theatrical performance, would not only have involved serious equal protection problems, but as we stated, it was "too evident to require elaboration" that such penalties "would have an inhibiting effect upon the exercise of First Amendment rights." (*Barrows v. Municipal Court, supra*, 1 Cal.3d 821, 827, 83 Cal.Rptr. 819, 464 P.2d 483.) We concluded that section 647, subdivision (a), was not intended to apply to live theatrical performances before an audience.

Since the acts involved here have not been adjudged obscene, they are within the protection of the First Amendment. To subject the producer and director of a nonobscene motion picture depicting sexual conduct to prosecution and punishment for pandering, including a special provision for ineligibility for probation attendant on such a conviction (see fn. 2, ante), would rather obviously place a substantial burden on the exercise of protected First Amendment rights. To include the hiring and paying of actors for acting in such a film within the definition of pandering would therefore unconstitutionally infringe on First Amendment liberties. Consistent with *Barrows*, *Burstyn*, *Burton* and *Flack* and consistent with the principles of statutory construction outlined above we are thus compelled to conclude that the Legislature did not intend the antipandering law to apply to the payment of acting fees for performance in a nonobscene motion picture. We observe that if section 266i were applied in the manner urged by the People, it would include within the literal sweep of the statutory language films of unquestioned artis-

tic and social merit, as well as films made for medical or educational purposes. We reaffirm our observation in *Barrows*, "any more restrictive rule could annihilate in a stroke much of the modern theater and cinema." (*Barrows v. Municipal Court*, *supra*, 1 Cal.3d 821, 831, 83 Cal.Rptr. 819, 464 P.2d 483.)

Placing reliance on *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, the People argue that there is a distinction between "speech" (e.g., a film), which is constitutionally protected under the First Amendment so long as it is not obscene, and "conduct" (the making of the film) which may be prohibited without reference to the First Amendment. Such a distinction is untenable in this case. In *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 the United States Supreme Court set forth standards to determine the constitutional propriety of governmental regulation of "conduct" which also contains elements of "speech." The factors to be considered are (1) whether the regulation is within the constitutional power of the government, (2) whether

the governmental interest is important or substantial, (3) whether the governmental interest is unrelated to the suppression of free expression, and (4) whether the incidental restrictions on alleged First Amendment interests is no greater than is essential to the furtherance of the interest. (*Id.*, at p. 377, 88 S.Ct. at p. 1679.)

Even if the regulation attempted here were within the constitutional power of the Legislature and the governmental interest could be found to be important, the application of section 266i in the manner advocated would clearly run afoul of the requirement that the governmental interest be unrelated to the suppression of free expression. The People have advanced two possible governmental interests: First, is the prevention of profiteering from prostitution, and second is a public health purpose, e.g., prevention of the spread of sexually transmitted diseases, such as AIDS. The governmental interest served by section 266i has been stated to be the prevention of recruitment to prostitution or of augmentation of the supply of available prostitutes. (*People v. Hashimoto* (1976) 54 Cal.App.3d

862, 867, 126 Cal.Rptr. 848; *People v. Courtney* (1959) 176 Cal.App.2d 731, 741, 1 Cal.Rptr. 789.) Punishment of a motion picture producer for the making of a nonobscene film, however, has little if anything to do with the purpose of combatting prostitution. Rather, the self-evident purpose of the prosecuting authority in bringing these charges was to prevent profiteering in *pornography* without the necessity of proving obscenity. The fact that the People concede that a film identical to that in this case could be made lawfully if the performers were not paid also belies the asserted "public health" interest. Both these suggested "interests" not only directly involve the suppression of free expression but are, in the context of a pandering prosecution for the making of a nonobscene motion picture, not credible.

The People's reliance upon *People v. Fixler, supra*, 56 Cal.App.3d 321, 128 Cal. Rptr. 363 to support defendant's conviction otherwise is also misplaced. First, the *Fixler* court failed to give sufficient consideration to the whole holding of this court in

Barrows, supra, 1 Cal.3d 821; 83 Cal.Rptr. 819, 464 P.2d 483. Secondly, *Fixler* is factually distinguishable from the instant case in a rather fundamental way. In *Fixler*, the defendants were a photo editor and photographer for American Art Enterprises, a publisher of sexually explicit magazines. The photographers obtained "models" from modeling agencies and paid fees to the models, who were photographed engaging in various types of sexual activity, from masturbation to oral copulation and sexual intercourse. The defendants in that case were convicted of pandering based on the use of one "model," a 14-year-old girl. The Court of Appeal upheld the conviction, making the flat statement that "There can be no question but that Patricia engaged in lewd acts and sexual intercourse for money ..." (*id.*, 56 Cal.App.3d at p. 325, 128 Cal. Rptr. 363) and that the defendants had therefore procured her "for purposes of prostitution."

The bald conclusion reached by *Fixler*, and reiterated in the related case of *People ex rel. Van de Kamp v. American Art*

Enterprises, Inc. (1977) 75 Cal.App.3d 523, at page 529, 142 Cal.Rptr. 338, that "sexual intercourse for hire by ... models [or actors] whose activity is photographed for [publication] ... is prostitution" simply ignores the First Amendment considerations that compel our contrary conclusion here.[6]

Moreover, the *Fixler* court's conclusion was based primarily on a misinterpretation of a portion of this court's opinion in *Barrows v. Municipal Court, supra*, 1 Cal.3d 821, 830, 83 Cal.Rptr. 819, 464 P.2d 483. We there stated that "acts which are *independently prohibited by law* [cannot] be consummated without sanction ... merely

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6. To the extent that *People v. Fixler, supra*, 56 Cal.App.3d 321, 128 Cal.Rptr. 363, *People ex rel. Van de Kamp v. American Art Enterprises, Inc., supra*, 75 Cal.App.3d 523, 142 Cal.Rptr. 338, and *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 115 Cal.Rptr. 528 hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering under section 266i, they are disapproved.

because they occur during the course of a theatrical play. Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero." (Italics added.)

The *Fixler* court correctly paraphrased our language in *Barrows* in stating: "The fact that a motion picture of an actual murder, rape or robbery in progress may be exhibited as a news film or a full length movie without violating the law does not mean that one could with impunity hire another to commit such a crime simply because the primary motivation was to capture the crime on film ..." (*Fixler, supra*, 56 Cal.App.3d at p. 326, 128 Cal.Rptr. 363), but erroneously concluded that the defendants there had "hired" the 14-year-old model to commit the independent crime of "prostitution." The conduct was, to be sure, independently unlawful, but it was not prostitution or the procurement of prostitution; the crime was aiding and abetting unlawful sexual intercourse with a minor in violation of section 261.5. (See also *People v. Zeihm, supra*, 40 Cal.App.3d

1085, 115 Cal.Rptr. 528 [cited in *Fixler*, in which the court states (without citation to authority) that exploitation of women in making pornographic movies is prostitution, but the gravamen of which involved the use of females under the age of consent, a violation of section 261.5].)

Undeniably, one cannot lawfully hire another to commit murder, rape or robbery for the purpose of photographing the act. Murder, rape and robbery and aiding and abetting intercourse with a minor for that matter, are crimes independent of and totally apart from any payment for the right to photograph the conduct.

By contrast, the acts of alleged "prostitution" in this case were not crimes independent of and apart from payment for the right to photograph the performance. The determination that pandering and prostitution occurred here was entirely dependent on the payment for the right to photograph. Indeed, under the People's theory the payment was used to establish not only the "hiring" but also elements of both the "pandering" (procuring) and the "prostitution" (i.e., lewd acts "for money"). When

considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful. The sexual conduct was between consenting adults and occurred in a place not open to the public.[7] And as we have stated, the film was not determined to be obscene.

The People also rely on a number of other California and out-of-state cases to support defendant's conviction, but in each instance their reliance is misplaced.

A New York court in *People v. Kovner* (1978) 96 Misc.2d 414, 409 N.Y.S.2d 349, found a legislative intent on the part of the New York Legislature to include payment for acting in a film containing sexually explicit conduct within the definition of prostitution. However, *Kovner* relied uncritically on *Fixler*, failing to recognize

7. Since decriminalization in 1975, oral copulation and sodomy performed in private between consenting adults are lawful and no longer constitute independently defined crimes. (Stats. 1975, ch. 71, §§ 7, 10, pp. 133–134; Stats.1975, ch. 877, §§ 1, 2, pp. 1957–1958.) Thus *People v. Drolet* (1973) 30 Cal.App.3d 207, 105 Cal.Rptr. 824, cited in *Fixler*, does not support the result in *Fixler*.

that the *Fixler* conviction was based on unlawful sexual conduct with a minor.

In *People v. Maita* (1984) 157 Cal.App.3d 309, 203 Cal.Rptr. 685, a provider of live nude entertainment was convicted of multiple counts of both pimping and pandering. In affirming the convictions, the court relied on *Fixler*, and to the extent it did so its opinion is infirm. Nevertheless, *Maita* is also fundamentally distinguishable from the instant case because it did involve prostitution, the payment by members of the "theater" audience for sexual conduct with the "actors" hired by the theater owner for that purpose. Thus although the theater owner was acquitted on charges of presentation of obscene live conduct (§ 311.6), convictions for procuring persons for purposes of prostitution could properly be affirmed. The Court of Appeal held that the pimping and pandering laws did not prohibit live nude entertainment, but "that the entertainer cannot have sexual relations with the audience." (*Id.*, at p. 316, 203 Cal.Rptr. 685.) Thus, the result in *Maita*

was sound,[8] but it has no application to this case.

The People's reliance on an Oregon case, *State v. Kravitz* (1973) 14 Or.App. 243, 511 P.2d 844, is equally misplaced. That case, like *Maita, supra*, 157 Cal.App.3d 309, 203 Cal.Rptr. 685, involved sexual conduct between a member of the audience and a performer at the defendant's entertainment establishment.

In *United States v. Roeder* (10th Cir. 1975) 526 F.2d 736, the defendant was prosecuted for a violation of the Mann Act (18 U.S.C. § 2421 et seq.) for transporting a woman across state lines for the purpose of performing in a sexually explicit motion picture. The purpose of the Mann Act is, however, quite removed from and has no direct impact upon First Amendment activities. The Mann Act is directed to the conduct of transportation across state lines for an immoral purpose. So far as the Mann Act is concerned the identical conduct

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8. It appears to us the conduct in *Maita* might also have supported a conviction of section 647, subdivision (a) [lewd conduct in a public place], but that offense was apparently not charged.

would not be criminal if done within a single state. Moreover, *Roeder* is singularly distinguishable from the instant case: There the defendant film producer actually participated in the sexual conduct in the film, for which he transported the woman across state lines.

Thus, the cases relied upon by the People do not support a result different from that which we have reached in this case.

DISPOSITION

For the foregoing reasons, the judgment of the Court of Appeal affirming defendant's pandering conviction based solely on the payment of wages to the actresses in his film, which was not determined to be obscene, is reversed.

MOSK, BROUSSARD, PANELLI and KLINE,* JJ., concur.

LUCAS, C.J., and EAGLESON, J., concur in the judgment.

APPENDIX B

OPINION OF COURT OF APPEAL IN PEOPLE V. HAROLD FREEMAN 233 CAL. RPTR. 510 (JAN. 6, 1987), ADHERING TO RULE OF LAW EXPRESSED IN 1976 IN PEOPLE V. FIXLER, UPHOLDING THE CONVICTION OF HAROLD FREEMAN OF PIMPING AND PANDERING (PENAL CODE SECTION 266(i)), FOR HIRING ACTORS AND ACTRESSES TO PERFORM SEX ACTS IN THE FILM "CAUGHT FROM BEHIND II".

eference: Motion For Leave to Intervene And Petition For Writ of Certiorari, at pages 2, 3, and 25)

The PEOPLE, Plaintiff and Respondent,

v.

Harold FREEMAN, Defendant and Appellant.

B015697.

Court of Appeal, Second District, Division 4.

Jan. 6, 1987.

Review Granted April 16, 1987.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of violating pandering statute, and he appealed. The Court of Appeal, Kingsley, Acting P.J., held that: (1) act of procuring actresses and actors to perform in sexually explicit film was not protected under First Amendment merely because it occurred within context of motion picture production, and (2) defendant who procured actresses and actors to perform in sexually explicit motion picture was guilty of pandering regardless of any sexual gratification the actors and actresses may have

obtained from their participation in the sexual acts depicted in the film.

Affirmed.

Arguelles, J., filed concurring opinion.

McClosky, J., filed dissenting opinion.

Constitutional Law ⇐90.4(4)

Act of procuring actresses and actors o perform in sexually explicit film was not protected by First Amendment merely because it occurred within context of motion picture production. West's Ann.Cal.Penal Code § 266i; U.S.C.A. Const.Amend. 1.

2. Prostitution ⇐1

Defendant who procured actresses and actors to perform in sexually explicit motion picture violated pandering statute regardless of any sexual gratification the actors and actresses may have obtained from their participation in the sexual acts depicted in the film; actors and actresses testified that they "acted" before cameras "for the money they received." West's Ann.Cal.Penal Code § 266i.

John K. Van de Kamp, Atty. Gen., Mark Alan Hart and Lauren E. Dana, Deputy Attys. Gen., for plaintiff and respondent.

Stuart Goldfarb, Beverly Hills, for defendant and appellant.

KINGSLEY, Acting Presiding Justice.

Defendant is a motion picture producer. He produced a film entitled, "Caught From Behind, Part II." This was a picture containing numerous explicit sexual acts and defendant was prosecuted under section 266i of the Penal Code [1] for procuring actresses and actors to perform in said picture. We affirm his conviction.

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1. Penal Code section 266i reads: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in

I

[1] Much of appellant's opening brief is devoted to a discussion of the application of the First Amendment. That discussion is out of place in this appeal. It is well settled that the distribution of a movie or book is protected by the First Amendment. However, a criminal act is not protected under the First Amendment merely because it occurs within the context of a

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which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

motion picture production.

II

[2] It is immaterial to defendant's conviction that the actors and actresses may or may not obtain any sexual gratification from their participation in the sexual acts depicted in the film. The actors and actresses herein involved were employed to engage in acts or prostitution, which is defined in numerous California cases as the engaging in sexual acts for money. The people herein engaged agreed to and did engage in sexual conduct and testified that they "acted" before the cameras in the production of the motion picture herein in question "for the money they received." The guilt of the defendant of the crime charged and of which he was convicted is clear.

The judgment is affirmed.

ARGUELLES, Associate Justice, concurring.

I concur.

People v. Fixler (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, and *People ex rel.*

Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, have unequivocally held that sexual intercourse for hire by models whose activity is photographed for publication is prostitution. *Fixler* specifically approved the use of Penal Code section 266i to prosecute a photographer and a photo editor of a pornographic firm for the hiring of a young female, for photographic purposes, to engage in lewd acts and sexual intercourse with another male. There is no essential difference between the taking of still photographs for publications and filming for the production of motion pictures.

The dissent interprets *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 83 Cal. Rptr. 819, 464 P.2d 483, as clothing the defendant with First Amendment protection from prosecution under California's common pandering statute. Yet a unanimous court of our own District in *Fixler* cites *Barrows* as authority for a different principle of law, stating: "The California Supreme Court held in *Barrows v. Municipal Court* ..., that acts which are independently prohibited by law cannot be consum-

mated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing material which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]" (*People v. Fixler, supra*, 56 Cal.App.3d at p. 326, 128 Cal.Rptr. 363.)

"The prosecution [for violating section 266i] here was based on conduct and was not aimed at prohibiting any communication of ideas. The manner of obtaining the photographs and the ultimate use to which those photographs might be put are separate and unrelated issues. While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which the material was originally obtained, where a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it." (*People v. Fixler, supra*, 56 Cal. App.3d at pp. 325–326, 128 Cal.Rptr. 363.)

The Supreme Court's majority decision in

Barrows, supra, was directed to interpreting Penal Code sections 647, subdivision (a), and 311.6, in the context of live theatrical performances. I do not view *Barrows* so broadly as to afford the cloak of First Amendment protection to actual illegal prostitution activities. In my judgment, the procurement for money of models to perform the acts involved in the case before us clearly falls within the ambit of section 266i.

McCLOSKY, Associate Justice, dissenting.

I respectfully dissent.

In *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 689, 68 Cal.Rptr. 721, 441 P.2d 281, our Supreme Court, citing *Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, concluded that "[i]t can no longer be questioned that expression by means of motion pictures is included within the free speech and press guarantees of the First and Fourteenth Amendments."

Barrows v. Municipal Court (1970) 1

Cal.3d 821, 830–831, 83 Cal.Rptr. 819, 464 P.2d 483, was a case in which two actors of a play entitled "The Beard," allegedly involving lewd conduct and speaking obscene words, were charged with violating Penal Code sections 647, subdivision (a) and 311.6, for the performance of the lewd conduct and the utterance of those words. The play's producer and director were charged with wilfully and unlawfully aiding and abetting them in committing those violations. All four defendants petitioned for a writ of prohibition to restrain the respondent court from proceeding to trial. The California Supreme Court reversed the trial court's denial of the writ with directions to issue the writ of prohibition as prayed for.

In doing so, the *Barrows* court first explained that it began "with the premise that live plays performed in a theater before an audience are entitled to the same protection under the First Amendment as motion pictures...." (1 Cal.3d at p. 824, 83 Cal.Rptr. 819, 464 P.2d 483.) It concluded that "such [theatrical] performances do not fall within the purview of [the vagrancy law] section 647, subdivision (a)." (*Id.*,

at p. 829, 83 Cal.Rptr. 819, 464 P.2d 483.) It also held that "the conclusion is inescapable under these circumstances that theatrical performances are not included within the prohibition of [Penal Code] section 311.-6." (*Id.*, at p. 830, 83 Cal.Rptr. 819, 464 P.2d 483, fn. omitted.)

The *Barrows* court went on to explain:

"Our holding here does not suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course of a theatrical play. Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero. Neither do we intend to imply, however, that conduct or speech in a theatrical production is to be judged by the same standards as conduct or speech occurring on the street or other public place. *Giannini* [*In re Giannini* (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535] makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the

protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.2d at p. 572 [72 Cal.Rptr. 655, 446 P.2d 535].) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theater and cinema. The loss to culture and to First Amendment rights would be equally tragic." (1 Cal.3d at pp. 830–831, 83 Cal.Rptr. 819, 464 P.2d 483.)

While the motion picture "Caught From Behind, Part II" may be of little value to our culture, the record does not reflect that petitioner has been charged with or found to have violated any obscenity law. I cannot conclude that the purpose of the Legislature in enacting Penal Code section 266i was to prevent the production or distribution of theatrical plays or motion pictures depicting sex acts between consenting adults. Had it wished to do so the Legislature could have added the production of such plays or films to the list of proscribed acts and conduct listed in that section. It did not do so. It is not our right to interpret a criminal statute broadly to aid a

finding of guilt, especially where to do so invades a First Amendment protection. It is plain to me that the defendant's purpose here was to profit from making a motion picture and not "to procure a person, or attempt to procure a person, for the purpose of prostitution" within the meaning of Penal Code section 266i.

The concurring opinion relies in large measure on *People v. Fixler* (1976) 56 Cal. App.3d 321, 324, 326, 128 Cal.Rptr. 363, to limit the holding of *Barrows*. *Fixler* involved "essentially ... the use of ... a 14 year old girl who was hired ... to perform ... in return for money ..." depraved and perverted sex acts which were photographed and were allegedly to be published in a magazine. The difficulty with taking that position is that *Fixler* focuses on only one part of the *Barrows* formulation in quoting *Barrows* as stating "'that acts which are independently prohibited by law cannot be consummated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing mate-

rial which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]' "

Neither *Fixler* nor the lead or concurring opinions deal with the equally important language in *Barrows* that states "[n]either do we intend to imply, however, that conduct or speech in a theatrical production is to be judged by the same standards as conduct or speech occurring on the street or other public place" and goes on to cite *In re Giannini, supra*, 69 Cal.App.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535, for the proposition that " 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.App.2d at p. 572 [72 Cal.Rptr. 655, 446 P.2d 535].) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theatre and cinema. The loss to culture and to First Amendment rights would be equally tragic." (1 Cal.3d at pp.

830, 831, 83 Cal.Rptr. 819, 464 P.2d 483.)

I don't think *Barrows* can be discussed fairly without considering its entire holding. More importantly, I don't see how we can be obedient to the principle of stare decisis if we disregard an important part of the Supreme Court's holding in *Barrows*. The *Barrows* court recognized that such serious crimes as murder, rape and maiming are excluded from the protection of the First Amendment but reaffirmed the portion of *Giannini* that held that "acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene." (69 Cal.App.2d at p. 572, 72 Cal.Rptr. 655, 446 P.2d 535.)

In his dissent in *Barrows*, Justice Burke expressed his view that the effect of the holding in that case "is to allow acts, however obscene, to be performed on the stage with complete immunity unless they are proscribed by other statutory provisions." (1 Cal.3d at p. 831, 83 Cal.Rptr. 819, 464

P.2d 483.) Even if that be so, *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937, makes clear that it is not the prerogative of an intermediate court to attempt to overrule a majority opinion of the Supreme Court. *Auto Equity Sales* requires us to follow the rule of *Barrows*. I therefore cannot concur in either the lead or concurring opinion.

I think also that the import of *Barrows* forecloses the distinction the lead opinion attempts to draw between the *production* of the motion picture and its *distribution*, attempting to afford the protection of the amendment to the distribution while withholding its protection from the production. *Barrows* makes no such distinction. In that case the Supreme Court held that the producer's petition for the writ of prohibition should have been granted along with that of the director and actors. It is true that the producer and director in *Barrows* were charged only with aiding and abetting the actors in committing the violations, but the principle is the same and reflects the

truth that the production of a motion picture is but an integral step from the conception of the idea of a film or a play to its viewing by an audience. It is obvious that the strictures of the First Amendment may be just as effectively violated by penalizing production as by penalizing distribution or viewing.

I would, therefore, reverse.

APPENDIX C

OPINION OF COURT OF APPEAL IN PEOPLE V. HAROLD FREEMAN 234 CAL. RPTR 245 (FEB. 2, 1987), RE PENALTY SET FORTH IN PENAL CODE SECTION 266(i).

Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 3).

The PEOPLE, Plaintiff and Appellant,

v.

Robert Harold FREEMAN, Defendant and Respondent.

B016295.

Court of Appeal, Second District, Division 4.

Feb. 2, 1987.

Review Granted April 16, 1987.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of pandering. Defendant appealed. The Court of Appeal, affirmed conviction. On remand, the Superior Court sentenced defendant to five years probation and assessed fine. People appealed. The Court of Appeal, Kingsley, Acting P.J., held that three-year prison sentence for violation of pandering statute would constitute "cruel and unusual punishment."

Affirmed.

McClosky, J., concurred and filed opinion.

Arguelles, J., dissented and filed opinion.

Criminal Law ⇐1213.8(3)

Three-year prison sentence for violation of pandering statute by employment of actors and actresses to appear in pornographic motion picture would constitute "cruel and unusual punishment," where pandering would be treated like armed robbery, and danger posed to public by crime was minimal. West's Ann.Cal.Penal Code §§ 266i, 1203.065, 1203.065(a); U.S.C.A. Const.Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

Ira Reiner, Dist. Atty. of Los Angeles County, Donald J. Kaplan, Eugene D. Tavris, and Dirk L. Hudson, Deputy Dist. Attys., for plaintiff and appellant.

Stuart Goldfarb, Beverly Hills, for defendant and respondent.

KINGSLEY, Acting Presiding Justice.

By an opinion filed January 6 of this year, we affirmed the defendant's conviction for a violation of the pandering statute, Penal Code section 266i. (*People v. Freeman* (Jan. 6, 1987, B015697). In that opinion, we held that the defendant had violated this statute by his employment of actors and actresses to appear in a pornographic motion picture. Penal Code section 266i states that conviction under this statute is punishable by imprisonment for a period of three, four, or six years. In addition, Penal Code section 1203.065 forbids the court to grant probation or suspend the sentence of a defendant found guilty of violating that section.[1] Following

1. Penal Code section 1203.065, subdivision (a), provides: "Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person convicted of violating subdivision (2) of Section 261, or Section 264.1, or Section 266h, or Section 266i, or Section 266j, or 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or subdivision (c) of Section 311.4."

the defendant's conviction, however, the trial court sentenced the defendant to five years probation, with the first 90 days to be served in county jail, and assessed the defendant the maximum restitutionary fine of $10,000. The court declined to sentence the defendant to the mandatory minimum three-year prison term required by Penal Code section 1203.065, ruling that the application of that statute to the facts of this case would constitute cruel and unusual punishment.

The People have appealed from that order. They cite the recent opinion in *People v. O'Connor* (1987) 188 Cal.App.3d 645, 233 Cal.Rptr. 529 and *People v. Jeffers* (1987) 188 Cal.App.3d 840, 233 Cal.Rptr. 692 for the proposition that the pandering statute does not impose inherently cruel and unusual punishment. With this we agree. We see nothing in that opinion, however, that limits a trial court's discretion to determine that a sentence is disproportionate to a defendant's individual culpability, as the trial court did here. (*People v. Dillon* (1983) 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697.)

In *In re Lynch* (1972) 8 Cal.3d 410, 425–429, 105 Cal.Rptr. 217, 503 P.2d 921, the Supreme Court identified a number of criteria useful in determining whether a particular sentence was so disproportionate to the crime as to constitute cruel and unusual punishment. These included considering both "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to the society" and comparing "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses*...." (*In re Lynch, supra*, 8 Cal.3d at pp. 425–426, 105 Cal.Rptr. 217, 503 P.2d 921; emphasis in original.)

We note that defendant's mandatory sentence of three, four, or six years for hiring adult actors to appear in a pornographic film is the same the defendant would receive if he had committed an armed robbery.[2] In addition to carrying a penalty comparable to the most severe offenses,

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2. Penal Code sections 211, 212.5, 213, 12022, subdivisions (a) and (b), and 1203.06, subdivision (a)(1)(iii).

the actual danger this crime poses to the public is minimal.[3] While there is undeniably a valid societal interest in preventing the exploitation of the naive actors and actresses who may have appeared in defendant's films, it is generally conceded that this interest is somewhat less than that involved in protecting the public from holdups. While we have no difficulty in holding that Penal Code section 1203.065 is constitutional, we conclude, as did the trial court, that the application of a minimum three-year prison sentence to the defendant in this case constitutes cruel and unusual punishment.

The order is affirmed.

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3. The only danger that can plausibly be suggested is that it exploits those few gullible actors and actresses who entertain visions of stardom and who may be embarrassed later in life by their celluloid histories. Unlike the dissent, we fail to see how either of these evils would be eliminated by having the actors engage in simulated intercourse, or, for that matter, how they would be less exploited if they had performed the same acts on film, but had gone without pay—conduct which would not constitute pandering.

McCLOSKY, Associate Justice, concurring.

I reluctantly concur in the affirmance of the trial court's order of July 15, 1985. This appeal (*People v. Freeman* (B016295)) arises from an appeal by the People from the trial court's order of July 15, 1985, suspending proceedings and granting probation for five years on the conditions, among others, that the defendant spend the first 90 days in county jail and pay the maximum restitution fine of $10,000 pursuant to Government Code section 13967, subdivision (a).

In *People v. Freeman* (Jan. 6, 1987, B015697), I dissented from my colleagues' affirmance of the conviction of defendant for the violation of Penal Code section 266[1] in the production of the film "Caught From Behind, II." I did so based on my belief (1) that sound principles of stare decisis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937) compel us as an inferior

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1. Unless otherwise expressly noted, all statutory references herein are to the Penal Code.

court to follow the majority opinion of the California Supreme Court in *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483, and (2) that the First Amendment to the United States Constitution and article I, section 2 of the California Constitution, under the circumstances of this case, prohibit defendant's conviction for the crime of violating section 266i.

Having done so, I now find myself in the uncomfortable position of having to participate in the appellate review of the July 15, 1985, order of the trial court.

I start from the premise that there is nothing inherently unconstitutional in the provisions of section 1203.065, prohibiting the suspension of imposition of sentence and the grant of probation to any person properly convicted of violating section 266i. (See *People v. O'Connor* (1987) 188 Cal. App.3d 645, 233 Cal.Rptr. 529 and *People v. Jeffers* (1987) 188 Cal.App.3d 840, 233 Cal. Rptr. 692.)

In making its July 15, 1985, order the trial court held that "the sentence prescribed by law in this case, the mandatory

three years in State Prison, under the facts of this case, is cruel and unusual and grossly disproportionate to the offense committed, and to the offender, the defendant." *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, which involved unlawful acts with a 14 year old, is clearly distinguishable from the case at bench which involves only consenting adults performing lawful acts in a private residence, a place not open to the public.

In *People v. Dillon* (1983) 34 Cal.3d 441, 480, 194 Cal.Rptr. 390, 668 P.2d 697, the Supreme Court held that "... a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability."

I agree with Justice Kingsley that the application of section 1203.065, subdivision (a) to the defendant on the facts of this case would constitute cruel and unusual punishment and would be grossly disproportionate to the offense found by the majority to have been committed in case number B016295. I consequently concur that

given the affirmance in said case number B016295 that the sentence imposed should be affirmed.

ARGUELLES, Associate Justice, dissenting.

I respectfully dissent.

In 1976, this appellate district held that, "The purpose of the anti-pandering statute (Pen.Code, § 266i) is to '... cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned.' [Citations.]" (*People v. Fixler* (1976) 56 Cal.App.3d 321, 327, 128 Cal.Rptr. 363.)

Engaging in the process of inductive reasoning to ascertain just what "evil" the anti-pandering statute seeks to condemn, we can trace that evil from the statute's language. "The term 'procure,' as it is used in the statute with relation to the crime of pandering, has a very definite and well understood meaning. A procurer is

one who exploits the virtue of a female by soliciting trade for a lewd and lascivious woman to gratify the lusts of other persons. A procurer is *an agent who promotes prostitution.* [Citations.] The result of soliciting patronage as the agent of a depraved woman is equally harmful to society whether the procurer carries on his loathsome trade with or without her consent." (*People v. Cimar* (1932) 127 Cal. App. 9, 13, 15 P.2d 166, emphasis added.)

As far as the Legislature and the courts are concerned, the evils of promoting prostitution did not change between the time *People v. Cimar, supra,* 127 Cal.App. 9, 15 P.2d 166, was decided and the time *People v. Fixler, supra,* 56 Cal.App.3d 321, 128 Cal.Rptr. 363, was decided 44 years later, just as the Legislature's three amendments to the anti-pandering statute in the 10 years that have passed since *Fixler* was decided have not specifically excepted still picture photographers or photo editors (or movie producers) from those who are subject to prosecution and conviction for pandering under the statute just because they are snapping pictures or rolling film.

While the "evil" to be condemned has not changed, the *form* of the promotion (of prostitution) and exploitation (of others' virtue for lustful gratification) *has* changed. When *Cimar* was decided, the "evil" usually took form in houses of prostitution (see Pen.Code, § 266i, subds. (c), (d)); as the court there concluded, "the legislature evidently intended to discourage the nefarious business of replenishing houses of prostitution with inmates." (*People v. Cimar*, *supra*, 127 Cal.App. at p. 14, 15 P.2d 166.) Now, however, the "evil" may also take the form of celluloid film or magnetic videotape of sex acts, performed for money, that can be played and replayed in movie theatres and on home video cassette players. I do not, however, believe that this change in form has changed the nature of the promotion and exploitation involved. One need look no further than count II here to see that the defendant promoted the prostitution of, and exploited, the owner of the residence where the filming occurred, a woman who had no acting experience and considered herself naive but had a desire or fantasy to be an "actress."

Defendant promoted the loss of, and exploited, her naivete in the gratification of others' lust through the medium of filmed sexual acts by employing her to engage in various sexual acts including intercourse before the camera, for which he paid her $200. Such on-location recruiting of neophytes is the same "nefarious business of replenishing," with respect to an industry which exploits the performance of sex acts for money, that the *Cimar* court found the Legislature intended to discourage with respect to houses of prostitution.[1] Then, as now, the person's consent is immaterial.

In the light of this review of the "evil" proscribed by the pandering statute, I am unpersuaded by the sentencing court's reasoning that the Legislature intended the statute to apply only to those connected

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1. Defendant, as a purveyor of what he, himself, calls "filth" and "smut," was charged with pandering as to four other women who were veteran adult film "actresses" employed to engage in such sex acts as vaginal intercourse, oral copulation and anal intercourse before the cameras on the same film. By his own account, defendant has produced more than 100 full-length sex films since 1968.

with the urban blight, violence and squalor of "street" pandering when the court refused to impose the prescribed minimum three-year sentence without probation (Pen. Code, § 1203.065, subd. (a)) as cruel and unusual as applied here, pursuant to *People v. Dillon* (1983) 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697. If it were only "force, violence, threats," victimization of neighborhoods, engendering of "street crime, litter or the repulsive specter [sic] of prostitutes soliciting people walking down the street in front of innocent citizens and school children in decent neighborhoods" that made pandering pernicious enough to warrant a state prison sentence, as reasoned by the sentencing judge here, then certainly that commercially successful class of prostitution sometimes referred as "out-call" and operated like, or more often under the guise of, an escort service must also be exempt from the minimum three-year state prison sentence of the anti-pandering statute. Is the defendant here, holding himself out as a legitimate movie producer, so unlike a panderer of "out-call" prostitution of the type described by the

recently-publicized "Mayflower Madam"? Is the nature of the exploitation of virtue and promotion of prostitution significantly different as between "out-call" prostitution panderers and "streetwalker" prostitution panderers so that a lenient three-month jail term is justified in the former while a mandatory three-year prison term is statutorily required in the latter? Not only do I not think so, but I do not believe the Legislature thinks so either.

This is not to say that panderers who employ force, violence, threats, drugs and any manner of vile and despicable coercive techniques of procuring are undeserving of more severe punishment than panderers who operate out of penthouse office suites without using such techniques. That is the very reason why the statute provides alternative sentences of three, four, or six years. That is the proportionality that should have been applied here—the very proportionality provided by the Legislature within the statute and left intact by it even after *People v. Fixler*, *supra*, 56 Cal. App.3d 321, 128 Cal.Rptr. 363 was decided.

As for the concern that state prison sentences will have a chilling effect on constitutionally protected creative expression in the theatre or film industries, that concern can only come from the mercenary voices of those who profit by the kind of exploitation involved here. If people performing sex acts before cameras are truly "actors" and "actresses," then let them *act*. Sex has been simulated effectively in the theatre and on the screen for years, just as violence and death have. But prostitution and pandering are not entitled to legal protection or less severe punishment just because such crimes are committed for an "adult sex film," just as murder deserves no protection or mitigated punishment when committed for a so-called "snuff film."

For these reasons, I would reverse the sentence and remand the matter for resentencing in a manner consistent with the views I have expressed.

APPENDIX D

COPY OF PETITIONER KAREN APPLEGATE AND PHIL APPLEGATES' "MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING BY RESPONDENT PURSUANT TO RULE 27(b); OR IN SUPPORT OF A HEARING GRANTED ON THE COURT'S OWN MOTION BEFORE THE DECISION BECOMES FINAL PURSUANT TO RULE 27 (a); WITH BRIEF AMICUS CURIAE ANNEXED", LODGED WITH THE CLERK OF THE CALIFORNIA SUPREME COURT ON SEPT. 9, 1988, AND FILED BY THE CALIFORNIA SUPREME COURT ON SEPTEMBER 14, 1988.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari at pages 3, 32, 35, 42, and 44).

S000070

2 CRIM. B015697

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	RECEIVED
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Plaintiff and Respondent,	)	
v	)	SUPREME COURT LOS ANGELES
HAROLD FREEMAN,	)	
Defendant and Appellant.	)	

APPEAL FROM THE SUPERIOR COURT

OF LOS ANGELES COUNTY

HONORABLE JAMES A. ALBRACHT, JUDGE

Motion For Leave To File Brief Amicus Curiae In Support Of Petition For Rehearing By Respondent Pursuant To Rule 27(b); Or In Support Of A Hearing Granted On The Court's Own Motion Before The Decision Becomes Final Pursuant To Rule 27(a); With Brief Amicus Curiae Annexed.

S000070

2 CRIM. B015697

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
v.	)
HAROLD FREEMAN,	)
Defendant and Appellant.	)

APPEAL FROM THE SUPERIOR COURT

OF LOS ANGELES COUNTY

HONORABLE JAMES A ALBRACHT, JUDGE

MOTION

To The Honorable Malcolm M. Lucas, Chief Justice, And To The Honorable Associate Justices Of The Supreme Court Of The State Of California:

Phil Applegate and Karen Applegate, the parents of the late Colleen

Applegate, also known as "Shauna Grant", move for leave to file a brief amicus curiae pursuant to Rule 14(b), in support of a Petition for Rehearing by the Respondent, pursuant to Rule 27(b) or, alternatively, in support of a Rehearing Granted By the Court on its own motion before the decision becomes final, pursuant to Rule 27(a).

Interest of Amicus Curiae

Phil Applegate and Karen Applegate, parents of Colleen Applegate, who performed in at least 29 hard-core pornographic films under the name "Shauna Grant", contend that, if permitted to stand, the decision of the California Supreme Court, filed August 25, 1988, will perpetuate the type of harm suffered by Colleen and the Applegate family as a result of the sexual conduct which this decision tolerates. The "World Modeling Agency

operated by Jim South", referred to in this Court's opinion (see 88 Daily Journal, DAR 11013 at 11014), is identified in the P.B.S. documentary on Colleen, "Death of a Porn Queen" as the very agency that "seduced" Colleen Applegate at age 18, and started her on the road to her death from a self-inflicted gunshot wound at age 20. A copy of the P.B.S. documentary is filed with this Court as Exhibit 6 to this motion.

The harm to the Applegate family did not end with Colleen's death in 1984. The producers of such films are presently broadcasting her hard-core films to the world on Satellite Television and are selling them in videotape form at neighborhood videotape stores throughout the United States. It is a well known fact that almost all of such films are produced in the State of

California. Their very existence is dependent, to a large degree, upon the "largesse" of the California Judicial system. It is generally recognized that were Freeman's conviction affirmed, that business "production" would vanish overnight.

Phil Applegate and Karen Applegate want to end the continuing hurt and degredation suffered by the Applegate family. Toward that end, on July 7, 1988, they filed a "Motion for Leave to File a Brief Amicus Curiae in the Supreme Court of the United States" in Fort Wayne Books, Inc. v. State of Indiana, No. 87-470, which is calendared for oral argument on October 3, 1988, asking that the Civil RICO Statutes be upheld as applied to such hard-core pornographic trade. In support of that motion, they, as the moving party, have lodged six exhibits with the U.S.

Supreme Court as a part of their "Brandeis" motion, as a background to the constitutional issues which are being addressed in that case. A copy of that motion and four of the six exhibits is concurrently being filed with this Court as Exhibits 1-5 to this brief and for the same reason:

> 1A, 1B. Two video tapes of the Satellite broadcast of S-1 Channel 18 on March 12, 1988, including the Colleen Applegate film "Suzie Superstar", as surveilled in Niagara County, New York.
>
> 2A, 2B. Two video tapes of the Satellite broadcast of S-1 Channel 18 on March 13, 1988, including the Colleen Appelgate film "Glitter", as surveilled in Niagara County, New York.
>
> 3. A-C. Three volumes of time and motion studies of 29 copyrighted, hard-core pornographic films in which Colleen Applegate appeared.
>
> 4. Video tape copy of P.B.S. Documentary, "Death of a Porn Queen", reporting on the background and death of Colleen Applegate at age 20.

5. Motion For Leave To File Brief Amicus Curiae, etc. in Fort Wayne Books, Inc. v. State of Indiana, No. 87-476.

6. Time and Motion Study of the film, "Caught from Behind II".

POINTS REQUIRING FURTHER ARGUMENT

Moving Parties contend that the opinion of this Court, filed on August 25, 1988, contains the following fundamental errors:

1. The opinion erroneously "assumes" that the film "Caught from Behind II" is not obscene. See opinion in 88 Daily Journal D.A.R. 11013 at 11013 reading:

> "Defendant Harold Freeman hired and paid actors to perform in a non obscene commercial film which portrayed sexually explicit acts. . ." (our emphasis.)

and at 11015 reading:

> "Since the acts involved here have not been adjudged obscene, they are within the protection of the First Amendment."

Moving Parties have attached a time and

motion study of the film "Caught from Behind II" as Exhibit 6 to this motion. A casual examination of this autoptical evidence clearly establishes beyond all doubt that the film is obscene as a matter of law and "contraband" under Federal law in that "reasonable minds would not differ and all reasonable persons would conclude that the film is "hard-core" pornography. See Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1983); U.S. v. 37 Photographs, 402 U.S. 363 at 377. Moving Parties submit that the opening statement of the Court's opinion that "Defendant Harold Freeman hired and paid actors to perform in a non obscene commercial film" (our emphasis), is so contrary to the autoptical evidence which is before this Court as to place in question the "honesty" of everything thereafter in the opinion, which is argued in support

of the Court's analysis. More succinctly, the "straw man", which the opening sentence attempts to create, falls apart when analyzed alongside the autoptical evidence in Exhibit 6 to this motion (time and motion study of "Caught from Behind II").

2. The Court erred in accepting the People's erroneous concession that the film in this case was not obscene. See Opinion in 88 Daily Journal D.A.R. 11013 at 11015 reading:

> "The fact that the People concede that a film identical to that in this case could be made lawfully if the performers were not paid also belies the asserted 'public health' issue."

This Court has a duty and obligation to make a moral judgment on the film which is before it, "Caught from Behind II". If this Court fails to so act, the result will be that other "talent agencies" will use this film and case as a bell weather and will openly demand

this type of sexual conduct from young actors and actresses, multiplying the harm that has been done in the past to persons like Colleen Applegate and Linda "Lovelace" Marciano by the criminal conspirators who are presently before this Court.

3. In overruling People v. Fixler, 56 Cal.App.3d 321, decided 12 years ago, and other cases which would mandate an affirmance of Freeman's conviction (see opinion at footnote 6), this Court improperly disregarded a fundamental rule of statutory construction (see Sutherland, Statutory Construction, Vol. 2a at §49.05 "Official Interpretation" and Vol. 3a at page 186, et seq. "Prior Construction"). See also Justice Arguella's statement in the Court of Appeal below, People v. Freeman, 233 Cal.Rptr 510 at 511:

> " People v. Fixler (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363,

> and People ex rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, have unequivocally held that sexual intercourse for hire by models whose activity is photographed for publication is prostitution. Fixler specifically approved the use of Penal Code section 266i to prosecute a photographer and a photo editor of a pornographic firm for the hiring of a young female, for photographic purposes, to engage in lewd acts and sexual intercourse with another male. There is no essential difference between the taking of still photographs for publications and filming for the production of motion pictures."

4. The Court's opinion in 88 Daily Journal D.A.R. 11013 at 11016 is in error, where it concludes:

> ". . . the acts of alleged "prostitution" in this case were not crimes independent of and apart from payment for the right to photograph the performance. The determination that pandering and prostitution occurred here was entirely dependent on the payment for the right to photograph. When considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful. the sexual conduct was between consenting adults and occurred in a place not open to the public. . . ." (Our

emphasis.)

The sexual acts depicted were not lawful. It is within the prerogative of the State Legislature to apply the pandering statutes to the conduct of individuals who meet in secret and conspire to film in two dimension form for commercial distribution and exhibition, that type of sexual conduct which is regarded as "lewd conduct" and against public policy when commercially exhibited in three dimension form. This is what People v. Fixler, 56 Cal.App.3d 321 "unequivocally" held, and was a correct statement of constitutional law. See the analysis and clear logic of Associate Justice Burke, speaking for the New York Court of Appeals in Trans Lux Dist. Corp. v. Board of Regents 248 N.Y.S.2d 857 (1964) and Justice Arguellas speaking in the court below in People v. Freeman 233 Cal.Rptr. 510 at

511.

5. The opinion fails to recognize that the sex acts being performed for Freeman provided independant evidence of at least three kinds of criminal conduct: (1) lewd conduct in public; (2) overt acts establishing a conspiracy to perform lewd conduct in public; and (3) overt acts establishing a conspiracy to produce and exhibit and distribute an obscene film. Since it is unlawful and against public policy to exhibit sex acts in public in three dimension, it is equally as unlawful and against public policy to film such acts and exhibit them on the public screen in two dimension. See Trans Lux Dist. Corp. v. Board of Regents, supra; U.S. v. Sandys, et al., 605 F.2d 210 (C.A. 6th, 1979) cert. denied in Gordon v. U.S. and Friedlander v. U.S., 444 U.S. 984 (Dec. 3, 1984). See Evans Theater Corp. et

al. v. Slaton, 180 S.E.2d 712, cited with approval by this Court in People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42 at 54, 130 Cal.Rptr. 328 at 335 (1976).

6. The police power to punish lewd conduct in public is not subject to the limitations set forth in U.S. v. O'Brien, 391 U.S. 367. Nor does the film "Caught From Behind II" present this Court with either legislation or subject matter which is controlled by U.S. v. O'Brien, 391 U.S. 367. If "dung" is placed upon tissue paper, that "parchment" is not thereafter entitled to First Amendment Considerations.

7. The major defect in Justice Kaufman's reasoning is his conclusion that Producer Freeman can meet in secret at his house with his co-conspirators to make what he and the industry would regard as the most obscene films ever

produced, and that no criminal conduct would occur until the obscene motion picture film had been completed.

ARGUMENT

I

The Performance Of Patently Offensive Representations Of Ultimate Sexual Acts, Actual or Simulated, In Public, Whether Real Or Simulated, Live Or As Part Of A Motion Picture Film, Or Video Tape, Such As "CAUGHT FROM BEHIND II", Or "DEEP THROAT", Or "SUZIE SUPERSTAR", Or "SHAUNA: EVERY MAN'S FANTASY", Or "GLITTER", Or "PRIVATE SCHOOL GIRLS", Is Obscene Per Se.

Where obscenity per se exists, no further evidence is necessary on that issue, inasmuch as the Court takes judicial notice of the fact that such finding is incontrovertible. In Mitchum v. State of Florida, 251 So. 2d 298 (Aug. 13, 1971), the Florida Court made the following comment on the application of judicial notice to material which was incontrovertibly obscene:

"Examination of appellants' argument. . . indicates that the real issue raised is the contention that the absence of testimonial evidence, . . renders the order of the lower court prejudicially erroneous and therefore reversible.

Long ago, it was held that in proper circumstances 'judicial notice' is superior to evidence since it fulfills the object which evidence is designed to fulfill and makes evidence on the point established by judicial notice unnecessary. Amos v. Moseley, 75 Fla. 555, 77 So. 619. It is designed as the cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. United States v. Hammers, D.C., 241 F. 542. courts are presumed to know what everyone knows. 13 Fla. Jur., evidence section 14. Thus, the question resolves itself into whether the materials here involved are of such character as to establish circumstances whereunder the court may determine the obscenity question without evidence." (Emphasis ours.)

"We hold that the materials herein are 'hard-core pornography' and therefore within the rule announced in United States v. Wild, 422 F.2d 34 (2d Cir. 1970), cert. denied 402 U.S. 986, 91 S. Ct. 1644, 29 L.Ed. 2d 152, reh. den. 403 U.S. 940, 91 S. Ct. 2242, 29 L.Ed. 2d 720.

In United States v. Wild, supra, the

Court stated "We think that photographs an be so obscene -- it is conceivably possible that they be so obscene -- that the fact is incontrovertible. These photographs are such. . ."

In Morris v. U.S., 257 A. 2d 341 (Dec. 2, 1969), the Court voiced the following test for material which was "obscene per se", i.e., obscene as a matter of law:

> "Although the definition and elements of obscenity have been authoritatively stated in Roth and Memoirs, definition of the often-used terms 'hard-core obscenity' and 'obscenity per se' has been neglected by the Supreme Court. The Court of Special Appeals of Maryland has faced this problem before and has defined these terms in the following language: Hard-core pornography or obscenity per se is obscenity which 'focuses predominantly upon what is sexually morbid, grossly perverse and bizarre without any artistic or scientific purpose of justification.' There is no desire to portray (it) in pseudoscientific or 'arty' terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially

> beyond customary limits of candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose (is) to stimulate erotic response. . . No proof other than the viewing of it, is required to determine if it is, in fact, obscene. "It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. Womack, supra, Hudson, supra. In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case-in-chief need not offer any evidence of national community standards." (Our emphasis.)

In Boreta Enterprises, Inc., v. Dept. of Alcohol Beverage, 2 Cal. 3d 85, 84 Cal. Rptr. 113 at 123 (Feb. 26, 1970),

Justice Sullivan writing for a majority of the California Supreme Court, acknowleged that the conduct at issue could be so extreme as to properly conclude that the subject matter was "per se" contrary to public morals.

The performance of patently offensive representations of ultimate sexual acts, normal or perverted, actual or simulated, or of masturbation or lewd exhibition of the genitals in public, whether real or simulated, live or as a part of motion picture films is obscene per se. By far the best legal analysis on this point of law is that of Judge Burke speaking for the majority of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents. 248 NYS 2d 857 (1964) where he notes that "conduct" may actually be "speech", and what appears to be "speech" (films) may only be "conduct", at page 857:

"While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures. (Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S Ct. 777, 96 L. Ed. 1092, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restrictions on freedom of speech (Local Union No. 10, etc., Plumbers Union v. Graham, 345 conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (Giboney v. Empire Ice & Storage Co., 336 U.S. 490, 69 S. Ct. 684, 93 L.Ed. 834). For example, in People v. Stover, 12 N.Y. 2d 462, 240 N.Y. S. 2d 734, 191 N.E. 2d 272, supra, app. dsmd. for want of a substantial Federal questions,

> 375 U.S. 42, 84 S. Ct. 147, 11 L.Ed. 2d 107, this court upheld an 'Aesthetic' ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.
>
> "Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if 'picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation; (Giboney v. Empire Ice & Storage Co., supra, 336 U.S. p. 501, 60 S. Ct. p. 690, 93 L. Ed. 834) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene behavior on the screen. . ."

Judge Burke reasons that since there is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public, it must necessarily follow that the portrayal of

sexual intercourse on the screen for money was not "speech" and was merely unlawful sexual conduct; at page 860 et seq:

> "In Kingsley Intern. Pictures Corp. v. Regents, 360 U.S. 684, 79 S. Ct. 1362, 2 L.Ed. 2d 1512, the opinion of the court repeatedly distinguished between the right to communicate any idea, however deviant from orthodoxy, and 'the manner of its portrayal' (360 U.S. p. 688, 79 S. Ct. p. 1365, 3 L.Ed. 2d 1512). The 'freedom to advocate ideas' was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice Clark who wrote: 'I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray acts of sexual immorality, perversion of lewdness." If New York's statute had been so construed by its highest court, I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters.' (360 U.S. p. 702, 79 S. Ct. p. 1372, 3 L.Ed. 2d 1512; emphasis in original).
>
> "It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibitions as similar conduct if engaged in on the street. I believe the nature

of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice Douglas acknowledged, dissenting in Roth v. U.S. . . . . in contrasting books with conduct; 'I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe conduct on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct' (Emphasis in text).

"This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theaters for money (e.g., Penal Law, Consol. Laws, c. 40, Sections 43, 1140, 1140-a, 1140-b). There have been many cases dealing with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretations, never, obviously, the First Amendment.

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the

screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil or the original. In such cases, the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

"The pattern of statutory regulation in New York aims at offensive -- more properly, obscene -- displays of conduct whether in the street (Penal Law Sections 43, 1140, 1140-b), on the stage (Penal Law, Sections 1140-a; People v. Vickers, 259 App. Div. 841, 19 N.Y.S. 2d 165 -- lewd dance) or on the screen (Penal Law Sections 1140-a, 1141; Education Law, Section 122). These laws care not about the communication of ideas (see Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L.Ed.

1117); they are aimed at certain narrow sorts of conduct. It seems to me, therefore, that if the defendants in People v. Stover, supra, could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, People v. Vickers, supra, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the 'nude gymnasium' prohibited by Penal Law, Sections 1140-b). Numerous other instances also suggest themselves.

"If we can accept the obvious -- that sexual intercourse whether performed in the part or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S. Ct. 585, 97 L.Ed. 946.) 'Freedom

> of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas J. dissenting in Roth v. United States, 354 U.S. 476, 514 77 S. Ct. 1305, 1324, 1 L.Ed. 2d 1498)."

The cogent point which Judge Burke so ably makes in Trans Lux Distributing Corp. v. Board of Regents, Supra, is that it is a non-sequitur to argue that one may present a filmed simulation of sexual intercourse because one may present a filmed dramatization of murder. There is no public policy which prohibits the portrayal of simulated murder. There is, however, a universally recognized right of the general public which is derived from the law of nature which prohibits the portrayal of sexual conduct in public, real or simulated. See Roth-Alberts, 345 U.S. 485, discussed hereinafter at Point IB. Judge Burke's closing

principle at page 863 is a fitting memorial which should be engraved upon the gravestone of that argument:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared over-riding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

The same "natural law" principle was voiced by the Georgia Supreme Court in its decision in Evans Theater Corp. et al. v. Slaton, 180 S. E. 2d 712 (Mar. 4, 1971) holding the motion picture film "I Am Curious (Yellow)" to be enjoinable as a public nuisance because of the sexual activity portrayed therein. In People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42, 130 Cal. Rptr. 328 (June 1, 1976) the California

Supreme Court gave express approval to the above stated "natural law" principles expressed by the Georgia Supreme Court in Evans Theater Corp. et al. v. Slaton, supra.

I(B)

The Right of Society to Proscribe "Obscenity" In Motion Picture Films Is A "Natural Law" Right Which Has Its Roots In The Laws of Nature. Under Our Declaration of Independence and The Federal Constitution, That Right Is Inherent in State Government and Is Immutable.

The "right" of society to restrain obscenity in motion picture films is a "natural law" right which is derived from the laws of nature. In expressing the reason for proscribing obscenity in the form of the motion picture film "I Am Curious (Yellow)", the Georgia Supreme Court in Evans Theater Corp et al. v. Slaton, supra, deduced that right from "natural law" reasoning, at page 715:

> "The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. Section 26-2001 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." (Our emphasis.)

In People ex rel Busch v. Projection Room Theater, 17 Cal 3d 42 at 54, 130 Cal Rptr 328 at 335 (1976), the California Supreme Court expressly agreed with the Georgia Supreme Court. It seems clear from the language used in the above opinion, namely: "If any semblance of civilization is retained in our country, the State must have standards of conduct permissible in

public" that both courts were talking about "natural law" rights which exists in all governments under the laws of nature, and were deducing from that principal the right of State government to so act.

This inherent "right" of society to restrain obscenity was before the United States Supreme Court in a challenge on first amendment grounds in Roth v. U.S. and Alberts v. California 345 U.S. 476 at 485. There, the High Court confirmed the existence of that natural law right by inductive reasoning from the past experience of all governments:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." (Our

emphasis)

The "right" of a Community to abate grossly hard-core pornographic materials is a right which is rooted in the "Laws of Nature and of Nature's God" upon which our constitutional rights are based. See the language of Thomas Jefferson, speaking in the Declaration of Independence, appearing at Roth v. U.S. supra, that the right of organized society to proscribe obscenity is a "natural law" right inherent in all men in all societies. The Universal judgment which the majority of the U.S. Supreme Court described in Roth supra, is nothing less than the immutable laws of nature and the unalienable rights acknowledged by all great philosophers and common law judges from the dawn of Western Civilization and guaranteed to individuals by our federal constitution. See, for example: */ (*/ Edmund Burke

and the Natural Law, Peter J. Stanlis at App. 1)

> ca. 340 B.C., Aristotle: Political justice is partly natural, partly legal. Natural justice is that which everywhere has the same force and does not exist by people's thinking this or that (Ethics, v, 7) Particular law is that which each community lays down and applies to its own members.... Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice which binds all men (Rhetoric, i, 13).
>
> ca. 54 B.C., Cicero: Right reason is indeed a true law which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law...It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all people;and there will be,

as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men all punishment (De republica, iii, 22).

533 A.D., Justinian: Natural laws which are observed among all nations are due to a divine providence. They remain in full force and are immutable (pandects, I,2).

ca. 1268, Henry de Bracton: The King himself ought not be subject to any man, but he ought to be subject to God and the law, since law makes the King. Therefore, let the King render to the law what the law has rendered to the King, vis, dominion and power, for there is no King where will rules and not the law (Tractatus de legibus, f. 5b).

1275, St. Thomas Aquinas: Since all things subject to Divine providence are ruled and measured by the eternal law...it is evident that all things partake somewhat of the eternal law, in so far as ...from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most

excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others...This participation of the eternal law in the rational creature is called the natural law...Every human law has just so much of the nature of law as it is derived from the law of nature. But if at any point it deflects from the law of nature, it is no longer a law but a perversion of law (Summa theologica, I, 2, Q. xci, art. 2; Q. xcv, art. 5).

1593, Richard Hooker: This (natural) law we may name Eternal, being that order which God, before all ages, has set down with Himself to do all things by...The (natural) laws...do bind men absolutely even as they are men, although they have never any settled fellowship, nor any solemn agreement among themselves what to do or not to do...Human laws are measures in respect of men whose motions they must direct...Such measures have also their higher rules to be measured by: which rules are two, the law of God and the Law of Nature. So that laws must be made according to the general law of nature (Of the Laws of Ecclesiastical Polity, I, ii, 6; I, x,i; III,9).

1608, Edward Coke: The Law of Nature was before any judicial or municipal law and is immutable. The law of Nature is that which God at the time of the creation of nature of man infused into his

heart for his preservation and direction; and this is the Eternal Law, the Moral Law, called also the Law of Nature (Calvin's Case, note 7, Rep. 12a).

1612, Francis Suarez: The rational basis of the Law of Nations....consists in the fact that the human race, howsoever many the various peoples and kingdoms into which it may be divided, always preserves a certain unity, not only as a species, but also, as it were, a moral and political unity called for by the natural precept of mutual love and mercy, which applies to all...For just as in one state of province law is introduced by custom, so in the human race as a whole, it was possible for laws to be introduced by the habitual conduct of nations, and all the more because the matters comprised within this latter system of law are few and very closely related to the Natural Law, and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself, that while this derivation of the law of nations from Natural Law may not be self-evident, that is, not essentially and absolutely required for moral rectitude, it is nevertheless quite in accord with nature and universally acceptable for its own sake (De legibus ac de Deo legislatore, Vol. II, Chap. xix).

1625, Hugo Grotius: The Natural Law is the dictate of right reason which points out that a given act,

because of its opposition to or conformity with man's rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the Author of nature...Many human laws may be established supplementing the Natural Law, but they cannot contradict it (De jure belli et pacis, I,i,10).

1672, Samuel Pufendorf: We may call it (Natural Law) likewise that law Universal or Perpetual, the former, in regard that it binds the whole Body of the Human Race, the latter, because it is not subject to change (Of the Law of Nature and Nations, Oxford ed. (Oxford, 1703), p. 95).

1690, John Locke: Municipal laws are only so far right as they are founded on the law of Nature, by which they are to be regulated and interpreted (Second Treatise on Civil Government, chap. 1 sec. 12).

1758, Emmerich de Vattel: As men are subject to the laws of nature and as their union in civil society cannot exempt them from the obligation of observing those laws...the whole nation remains subject to the laws of nature and is bound to respect them in all its undertakings (Le droit des gens, Int.5).

1765, William Blackstone: This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in

> obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original (Commentaries on the Laws of England, Chitty ed. (New York, 1832), I, 27-28).
>
> 1776, Thomas Jefferson: When in the Course of human events, it becomes necessary for one people to dissolve the political bands, which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind require that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness (The Declaration of Independence, p.1).

CONCLUSION

A rehearing should be ordered and the judgment of conviction below should be affirmed upon the natural law principles urged hereinabove.

Date: September 9, 1988

Respectfully Submitted,

/s/James J. Clancy

JAMES J. CLANCY
Attorney for Moving Parties and
Amicus Curiae Phil Applegate and
Karen Applegate

STATE OF CALIFORNIA)
) SS. PROOF OF
) SERVICE BY MAIL
COUNTY OF LOS ANGELES)

I, JAMES J. CLANCY, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the within entitled action. My business address is 9055 La Tuna Canyon Road, Sun Valley, California 91352. On September 9, 1988, I served a true copy of :

Motion For Leave To File Brief Amicus Curiae In Support Of Petition For Rehearing By Respondent Pursuant To Rule 27 (b); Or In Support Of A Hearing Granted On The Court's Own Motion Before The Decision Becomes Final Pursuant

To Rule 27(a); With Brief Amicus Curiae Annexed.

on the Parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Sun Valley, California, Addressed as follows:

Mr. Dennis A Fischer
1448 15th Street, Suite 100
Santa Monica, California 90404

Lauren E. Dana
Office of the Attorney General
3580 Wilshire Boulevard, Room 800
Los Angeles, California 90010

I declare that I am a member of the Bar of this Court and the person making this service.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 1988, at Sun Valley, California.

/s/ James J. Clancy
JAMES J. CLANCY

APPENDIX E

COPY OF ORDER OF CALIFORNIA SUPREME COURT, FILED OCTOBER 20, 1988, DENYING PETITIONERS' MOTION FOR THE CALIFORNIA SUPREME COURT TO GRANT A REHEARING ON ITS OWN MOTION.

(Reference: Motion For Leave To Intervene and Petition for Writ Of Certiorari, at pages 5 and 36).

E-1

No. S000070

IN THE

SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

Supreme Court
FILED
Oct. 20, 1988
DW Clerk
DEPUTY

PEOPLE, Respondent,

v.

HAROLD FREEMAN, Appellant,

ARGUELLES, J., DID NOT PARTICIPATE.

The motion for this court to grant a rehearing on its own motion, filed September 14, 1988, is DENIED.

Lucas

Chief Justice

APPENDIX F

COPY OF REMITTITUR OF THE CALIFORNIA SUPREME COURT, FILED OCTOBER 21, 1988

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 4).

IN THE

SUPREME COURT OF THE

STATE OF CALIFORNIA

REMITTITUR

To the	) Supreme Court No. S000070
Court of Appeal,	)
	) Court of Appeal No. B015697
THE PEOPLE,	)
Respondent,	) County Los Angeles
	)
	) Superior Court No. A805936
vs.	)
	)
HAROLD FREEMAN,	)
	)
Appellant.	)
	)
	)

I, JOHN C. ROSSI, Acting Clerk of the Supreme Court of the State of California, do hereby certify that the attached are copies of the original judgment now final, entered in the above-entitled cause on the 25th day of August, 1988.

Costs, if any, shall be taxed by the Court of Appeal.

WITNESS my hand and
the seal of the Court,
this 21st day of
October, 1988.

JOHN C. ROSSI,
Acting Clerk

By Bessie Wong
Deputy

Enclosures: 2 certified copies of opinion
2 remittiturs
1 receipt

APPENDIX G

COPY OF "MOTION TO AFFIRM" FILED BY APPELLEE OHIO EX REL CHARLES H. KEATING JR. IN 1973 IN A MOTION PICTURE ENTITLED "VIXEN" ET AL V. STATE OF OHIO EX REL CHARLES H. KEATING JR. 413 U.S. 905 (June 25, 1973) REQUESTING THAT THE JUDGMENT OF THE OHIO SUPREME COURT BELOW BE AFFIRMED, BASED UPON THE ANALYSIS OF ASSOCIATE JUSTICE BURKE IN TRANS LUX DIST. CORP. V. BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 23).

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-599

A MOTION PICTURE FILM ENTITLED "VIXEN", RUSS MEYER, EVE PRODUCTIONS, INC., MALIBU INC., and CLARENCE P. GALL,

Appellants,

vs.

STATE OF OHIO, *ex rel.* CHARLES H. KEATING, JR.,

Appellee.

On Appeal From the Supreme Court of Ohio.

PETITION FOR REHEARING.

Petitioner, State of Ohio, *ex rel.* Charles H. Keating, Jr. prays that a rehearing be granted of this Court's decision of June 25, 1973, vacating the judgment of the Ohio Supreme Court in the above-entitled case. Petitioner further requests that said judgment of the Ohio Supreme Court be affirmed on the merits, upon the authority of this Court's recent rulings in *Miller v. California*, ... U.S. .... (June 21, 1973); *Paris Adult Theatre I v. Slaton*, ... U.S. .... (June 21, 1973); *Kaplan v. California*, ... U.S. .... (June 21, 1973); *United States v. 12-200 ft. Reels of Super 8 mm Film*, ... U.S. .... (June 21, 1973) and *United States v. Orito*, ... U.S. .... (June 21, 1973), and more precisely in accordance with the principles expressed in this Court's opinion in *United*

States v. 12-200 ft Reels of Super 8 mm Film, supra, at p. 7 fn. 7. In the latter case the majority gave authoritative judicial construction (*i.e.*, "judicial gloss") to the federal obscenity statutes, 19 U.S.C. Section 1305 (a) and 18 U.S.C. Section 1462 under this Court's "duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided,'" and implied that, were a state judicial system to adopt a similar approach and incorporate "specificity" *re* sexual conduct by way of judicial gloss on the state obscenity statute, no substantial federal question would thereafter be raised in applying such statute to given subject matter. If such is not the effect of this Court's decisions on June 21, 1973 then this Court is in a much bigger obscenity mess than that which flowed from the 1966 October Term reversals in *Redrup v. New York,* 386 U.S. 767 *et al.*

In the flurry of obscenity cases disposed of on June 21, 1973 and June 25, 1973, this Court overlooked the fact that, in the appeal herein, the Ohio judiciary had already construed the obscenity laws of the State of Ohio in a manner which rendered them specific, a factor which distinguishes the case herein from others on the 1972 October Term docket. See *City of Youngstown, Ohio v. Le Loreto,* 251 N.E.2d 491 at 500, 48 Ohio Op. 2d 393 (Sept. 10, 1969); *State of Ohio ex rel. Ewing v. Without a Stitch,* 57 Ohio Op. 2d 184 at the footnote on page 187 (July 9, 1971); Hamilton

County Common Pleas Judge Simon Leis' trial court opinion in *State of Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen"*, unreported, but appearing in Appellant's Statement as to Jurisdiction at pages 13a-15a; and *State of Ohio ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 141, 142, 27 Ohio St. 2d 278 (July 21, 1971). Further, the Ohio legislature had already enacted specific legislation of the type which was exemplified by this Court in *California v. Miller*, ... U.S. .... at slip opinion, pages 10-11 and which this Court wrote into the federal statutes as a federal standard in *United States v. 12-200 ft. Reels of Super 8 mm Film, supra.* See Ohio Revised Code Section 2905.34, *infra*, at page 11, and reproduced in Appellants' Statement as to Jurisdiction at Appendix pages 49a-50a. The opinion and judgment of the Ohio Supreme Court in *A Motion Picture Film Entitled "Vixen" et al. v. State of Ohio ex rel. Charles H. Keating, Jr.* was written with that obscenity history in the background.

The Ohio Judiciary, Through Decisional Law, Has Engrafted Specific Standards Onto the Term "Obscene" as Used in the Ohio Obscenity Laws.

The common standards of right and wrong embodied in the criminal statutes of Ohio dealing with sexual morality have, by judicial construction, been subsumed in the term "obscene" as used in the obscenity statutes. If such depictions are accompanied with the same "mens rea" which defines an offense under the criminal statutes, such also is in violation of the specific standards prescribed by the term "obscene". In *De Loreto*,

supra, the Court in examining several sex magazines on appeal, enumerated the state statutes and city ordinances which prohibited immoral conduct. From that the Court deduced what the moral standards of Ohio people on sex were, at page 500:

> *"The moral standards of the people in Ohio on sex are readily ascertainable because of the statutes that have been enacted on the subject. Youngstown has similar ordinances to the statutes of the state of Ohio.*
>
> "OHIO LAWS INDICATING SEX MORAL STANDARDS.
>
> "Laws of Ohio and the city of Youngstown relating to sex, which indicate the moral standards of the people of Ohio, prohibit the following:
>
> "1. Adultery or fornication. Section 2905.08, Revised Code. Youngstown City Ordinance 132.03.
>
> "2. Prostitution. Sections 2905.14 and 2905.-27, Revised Code. Youngstown City Ordinance Sections 132.01, 132.04 and 132.06.
>
> "3. Any person eighteen years of age or over wilfully making an indecent exposure of his person in a public place or in a place where there are other persons to be offended or annoyed thereby, or solicit another to engage in an act of sex perversion. Section 2905.30, Revised Code. Youngstown City Ordinance 132.11.
>
> "4. Any person eighteen years of age or over wilfully exposing his or her private parts in the presence of two or more persons of the opposite sex. "Private Parts" means the external genitalia of the human body. Section 2905.31, Revised Code.
>
> "5. Sodomy, Section 2905.44, Revised Code.

"MORAL STANDARDS OF OHIO PEOPLE ON SEX

"Thus, the laws of Ohio and the City of Youngstown prohibit extra-marital sexual relations, as offensive to the moral standards of the people of Ohio. Nudity to the extent of exposing the external genitalia of a male or female human body is also prohibited as likely to incite or encourage extra-marital sexual relations.

"We hold that one of the purposes of Section 2905.34, Revised Code, and of Youngstown City Ordinance Section 132.09(a), is directed at obscene publications that are likely to incite or encourage sexual conduct contrary to the moral standards of the people of Ohio." (Our emphasis.)

Hamilton County Common Pleas Judge Leis, in his trial court opinion herein in *Ohio ex rel. Keating v. Vixen,* dated November 17, 1969, applied the same rationale in his evaluation of the contemporary standards of the community (See Appellants' Statement as to Jurisdiction at p. 13a).

"The Court, under its prerogative to believe or disbelieve, or accept all or part, or none of the testimony and evidence presented, is of the opinion that such testimony does not reflect the true feeling and acceptability by the community of 'Vixen' type of film. First of all, acceptability by an audience is not the true criteria of the measurement of the community standard, and acceptance of a film by the community, because the attending audience is but a segment of the community, and I might say a very small segment of the Community.

"*A proper criteria for evaluation of the contemporary standard of the community is its establishment and enforcement of laws governing the conduct of its citizenry. A simple reference in the Ohio Revised Code sets forth the moral standards of the people of Ohio, including this community, on sex matters. These laws are enforced in this community, and include:*

Adultery or Fornication—Section 2905.08 O.R.C.
Prostitution—Section 2905.10 O.R.C.
Indecent Exposure—Section 2905.30 O.R.C.
Solicitation of Unnatural Sex Act—Section 2905.30 O.R.C.
Nudism—Section 2905.31 O.R.C.
Incest—Section 2905.07 O.R.C.
Rape—Section 2905.01 (etc.) O.R.C.
Sodomy—Section 2905.44 O.R.C.

"*These laws as well as local ordinances set forth the moral standard of the community,* and under proper presentation, they are enforced.

"In the case of Trans Lux Distributing Corp. vs. Board of Regents (248 NYS 2d 857), Judge Burke states 'It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibition as similar conduct if engaged in on the street.'

"The community does not allow, or condone, fornication on the street corner, or any public display of nakedness. Bare bosomed women are not permitted to walk the streets. If this happens, prosecution follows. *If the community does not accept (and permit) public display of sex* acts and

nakedness *on its streets and in public places, can it be said that a movie displaying such conduct meets the standards of the community? Definitely not.*" (Our emphasis.)

Lucas County Common Pleas Judge Nicholas J. Walinski arrived at the same result in his Findings of Fact and Conclusions of Law handed down in *State of Ohio ex rel. Ewing v. Without A Stitch,* on September 15, 1970:

"Finding of Fact . . .

"10. That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. *The proper criteria for a valuation of contemporary standards* of the community relating *to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing the conduct of citizenry; that simple reference to the Ohio Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters* and that there is generally attempted enforcement in this community. These Sections include, but are not limited to the following:

Sec. 2905.08 O.R.C., Adultery or Fornication
Sec. 2905.10 O.R.C., Prostitution
Sec. 2905.30 O.RC., Indecent Exposure
Sec. 2905.30 O.R.C., Solicitation of Unnatural Sex Act
Sec. 2905.31 O.R.C., Nudism
Sec. 2905.44 O.R.C., Sodomy

> There are existing similar statutes in the majority of states, giving an inference of national community standards." (Our emphasis.)

In affirming the decision of Judge Walinski, the Court of Appeals of Lucas County noted in *State ex rel. Ewing v. Without. A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971):

> "*We have also considered as indicative but not conclusive of national standards the laws of the State of Ohio* and other states.* See Roth, 354 U.S. at page 485."

As a footnote to that portion of the Court's opinion, the following appeared:

> *"*Among the laws of Ohio which are indicative are the following. See Section 2905.34, Revised Code. Its pertinent parts are as follows: . . .*
>
> "This statute was effective September 15, 1970, after the filing of the complaint, but before the decision of the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are:
>
> "Section 2905.08 Revised Code—Adultery or Fornication: Section 2905.10, Revised Code—Inducing illicit intercourse; Section 2905.26, Revised Code—Prostitution, lewdness and assignation defined: Section 2905.30, Revised Code—Indecent exposure: Section 2905.31, Revised Code—Nudism; Section 2905.44, Revised Code—Sodomy." (Our emphasis.)

The Ohio Supreme Court in its opinion herein in *State ex rel. Keating v. Vixen*, 27 Ohio St. 2d 278, 272

N.E.2d 137 (July 21, 1971) removed all doubt that the above decisional law represented an authoritative interpretation of the word "obscene" in the State of Ohio, at page 140:

> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse.
>
> "*Since the real issue before this court is whether the injunction should be dissolved, or continued* in force and *effect, R.C. §§ 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the injunction granted below.*[1]
>
> "*Those two sections, now the law of Ohio, when construed together and applied to the instant facts,* effectively provide that: 'No person, with knowledge of the content and character of the * * * motion picture * * * involved, shall * * * present *such* motion picture * * * before an audience *which* contains a series of displays * * * of * * * sexual intercourse * * * the cumulative effect of which is a dominant tendency to appeal

[1]On this principle alone the *Vixen* case should have been affirmed. There is nothing that bars a State Supreme Court from giving interpretative rulings piecemeal, where the only issue before the State Supreme Court is whether or not an injunction should issue. If that were not so, how did this Court's ruling in *United States v. 12-200 ft. Reels of Super 8 mm. Film* at slip opinion, page 7, footnote 7 differ? Further, what principle of jurisprudence requires "specific standards", either legislatively created or judicially created, on noise or odor emissions before an Equity Court can make a determination in a civil action that a given activity is the proper subject of an injunction because it is being operated against the public welfare. Petitioner submits that this is a case of not seeing the forest for the trees.

to prurient interest, when the appeal to such interest is * * * for commercial exploitation. * * *" (Italicized words supplied.) So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.' Schneider v. State (1939), 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

"*Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial exploitation rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose' is forbidden by Ohio law.* Here, there is no dispute as to the fact that 'Vixen' does depict numerous acts of *purported sexual intercourse,* and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes. (Our emphasis.) * * *

"*Therefore, where scenes in a motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R.C. §§ 2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. § 3767.01, and their exhibition may be enjoined as provided in* R.C. § 3767.02 *et seq.*" (Our emphasis).

"It is an ancient maxim of the law that 'legis interpretatio legis vim obtinet'; that is to say, the authoritative interpretation put upon the written law by the courts acquires the force of law, by

becoming, as it were, a part of the statute itself. The importance of adhering to this rule is seen in the fact that the judicial explanation of an obscure or ambiguous statute is at once accepted as correct by those whose rights or actions may be affected by the statute, and innumerable transactions will thereafter depend for their validity and effect upon the permanence of the judicial construction in view of which they were had. 'The court almost always, in deciding any question, creates a moral power above itself.' " Black on Interpretation of Laws, Second Edition at page 616.

Ohio Revised Code Section 2905.34 Provides Specific Standards of the Type Exemplified by This Court in California v. Miller.[18]

Ohio Revised Code Section 2905.34 reads as follows:

R.C. 2905.34:

As used in Sections 2903.13 to 2903.16, inclusive, and Sections 2905.34 and 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement,

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[18]Note, in particular, O.R.C. Section 2905.34A (2) and (4) and the reference in those sections to "sexual conduct" as that term is defined in Section 2905.34(D).

or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

While the above statute was not effective until September 15, 1970, which was after the *Without A Stitch* and *Vixen* trials (a fact noted in the footnote at page 187 in *State ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch"*) that statute with its specific standards was considered by both the Court of Appeals of Lucas County and the Ohio Supreme Court in applying the Ohio judicial standard of obscenity to the Civil Law Question of whether or not the films should be enjoined.

As noted by the Ohio Supreme Court in its opinion in *State of Ohio ex rel. Keating v. A Motion Picture Film Entitled Vixen, supra,* at page 141 no "ex post facto" issue was presented, inasmuch as that lawsuit was civil in nature, and involved only one issue; namely whether or not an injunction should issue. Compare here the problems raised by this Court's decision of June 21, 1973, in the criminal appeals in *Miller v. California,* .... U.S. .... (June 21, 1973); *Kaplan v. California,* .... U.S. .... (June 21, 1973), and a host of other criminal convictions which appeared on the 1972 October Term obscenity docket and whose judgments were vacated, as well as other criminal convictions at various stages of appellate review. See *Cole*

v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514 and Justice Black dissenting in *Ralph Ginzburg v. U.S.*, 383 U.S. 463, 477, 16 L.Ed.2d 31, 42, 86 S.Ct. 942 (March 21, 1966).

The above statement of facts as to specificity of Ohio Standards had no particular significance at the time that the Motion to Affirm was filed herein. As pointed out in Petitioner's Suppplemental Brief in Support of Motion to Affirm[2] this Court has, for the past

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[2]The Supplemental Brief in Support of Motion to Affirm was filed with this Court for the purpose of advancing certain arguments against the Court's action in reversing the judgment of the Washington Supreme Court in *Rabe v. Washington*, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993 (March 20, 1972). At page 23 thereof, petitioner herein submitted that the "fair notice" problem should be dealt with through the "scienter" issue rather than by suggesting that the word "obscene" was vague. Petitioner submits that, in moving toward specificity this Court has gambled heavily upon factors beyond its control, such as the state judiciary's (1) ability to recognize and (2) willingness to follow the solution which the majority offers. With two routes left open, those of an opposing philosophy are not likely to follow such leadership, even though it comes from a majority of this Court. The majority of this Court must recognize that were Associate Justices Douglas, Brennan, Stewart and Marshall now sitting on state and trial appellate courts, those justices would seize the opportunity to apply their personal philosophical view, which abhors obscenity legislation, and would strike the state statutes as vague. The same result can be expected in many of the state courts below. This has already occurred in the Santa Monica, California Superior Court where Judge George Dell has sustained defendant's demurrers in *People of the State of California v. Bloom, Appelby and Sommers* (See Daily Variety article of Thursday July 12, 1973 at Appendix A-1 and note Judge Dell's ruling on Oral Copulation Law in Los Angeles Times, dated September 12, 1972 at Appendix A-2) on July 18, 1973, Allen County Superior Court Judge Robert L. Hines held that the Fort Wayne City Ordnance, which used the same definition as the Indiana Statute, was unconstitutional because it did not specifically itemize exactly what conduct was barred, and dismissed *City of Fort Wayne v. Gregory Myers and Mary Streidel* which arose out of a showing of the film "Deep Throat" at the Cinema X in Fort Wayne, Indiana. All of which portends a considerable amount of difficulty for the cases which were remanded

15 years denied the need for specificity in the area of obscenity. See Supplement Brief in Support of Motion to Affirm at pages 11-17, and, in particular, page 15 *et seq.*.

"There is no question whatsoever that the *Roth* Court completely rejected the need for specificity in this area. On the same day that *Roth v. U.S* (*supra*) was decided, that Court had an option. It had before it *Adams Newark Theatre Co. v. Newark*, 354 U.S. 931, 1 L.Ed.2d 1533, 77 S. Ct. 1395, dealing with a city ordinance which utilized 'specificity', designed to control burlesque shows appearing at the Newark Adams Theatre. In 126 Atl.2d 340, the two ordinances were described at page 341:

. . . The original ordinances, in general terms, condemned lewdness, obscenity or indecency on the part of the actor or the show, but the amendments specifically place certain conduct within these prohibited classifications.

'Since the language of the amendatory ordinances is materially identical, it becomes necessary to quote the new provisions of only one:

' "The removal by a female performer in the presence of the audience of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts;

' "the exposure by a female performer in the presence of the audience, or the giving of the illusion of nudeness in the presence of the au-

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on June 21, 1973 and June 25, 1973, and suggests the need for additional guidelines at an early date in the 1973 October Term of Court.

dience, of the lower abdomen, genital organs, buttocks or breasts;

' "the exposure of a male performer in the presence of the audience of the genital organs or buttocks;

' "the use by a performer of profane, lewd, lascivious, indecent or disgusting language;

' "the performance of any dance, episode, or musical entertainment, the purpose of which is to direct the attention of the spectator to the breasts, buttocks or genital organs of the performer." '

The *Roth* Court rejected the invitation to open Pandora's box (see the New Jersey Supreme Court opinion in *Adams Newark Theatre Co. v. Newark*, 12 N.J. 267, 343, 96 Atl.2d 519, where that court points up the 'constant dilemma') and simply granted the City of Newark's motion to affirm, without argument. Compare the recent decisions of this Court in *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. ..... (June 7, 1971) and *Gooding v. Wilson*, ... U.S. ..... 31 L.Ed.2d ....., ... S.Ct. ..... (Mar. 23, 1972), and note Associate Justice Blackmun's dissent in *Gooding* that, 'The Court has painted itself into a corner from which it, and the states, can extricate themselves only with difficulty.' "

The sudden about face from the direction in which the Court had been moving,[8] which occurred on June 21,

[8]The Court is deceiving itself if it believes that "specificity" is the elixir which will solve this Court's obscenity problems. This nation's difficulty has been with the individual members of this Court, not with the definition of obscenity. Consider the disas-

1973 in the above cases, has made the above mentioned historical facts in the Ohio jurisdiction and the disposition of the *Vixen* case a matter of paramount importance.

If this Court does not examine and affirm the action taken by the Ohio judiciary and publish the same as the proper direction for state courts to move, it will be impossible to construct a legal argument to implement this Court's instruction, which, as Petitioner understands the same to be, calls for the engrafting of "specificity" onto the obscenity statutes through the application of "judicial gloss". Further the pornographers will deny that the specificity required by this Court can be achieved through the application of "judicial gloss" —their argument will be, "If that is what the Court meant to suggest, why was Vixen not affirmed?"

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trous result this Court's transitory rulings have had on the State of Florida for the past 15 years. Until *Roth-Alberts*, 354 U.S. 476 (1957), Florida employed a judicial test for the word "obscene." In an effort to conform with this Court's direction, the Florida legislature codified the *Roth-Alberts* test, only to have that test thrown into doubt by the tri-partite test enunciated by Justices Fortas, Warren and Brennan in *A Book Named Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413, 16 L.Ed. 2d 2, 6, 86 S.Ct. 975, and declared unconstitutional by a three-judge federal district court in *Austin v. Meyer*, 319 F.Supp. 457 (Aug. 14, 1970). A direct appeal in that matter was filed with this Court on November 5, 1970, but this court carried the case on its docket for two years and seven months without rendering a decision. Finally in desperation, the Florida legislature in 1973 enacted a new statutory test, based upon the tri-partite test in *Memoirs* only to have this Court rule on June 21, 1973 that that, also, was inadequate. While the Florida Supreme Court in *Florida v. Reese*, 222 So.2d 732, decided May 21, 1969, declared itself ready and willing to follow this Court's policy:

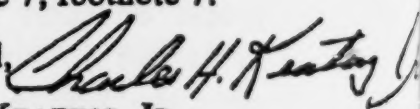
> "There can be no doubt that prosecutions under an obscenity statute may be initiated and tried under a court-adopted standard of obscenity as well as under a legisla-

(This footnote is continued on next page)

Conclusion.

Petitioner prays that a rehearing be granted as to this Court's decision of June 25, 1973 and that the judgment of the Ohio Supreme Court be affirmed on the merits in accordance with the principles expressed by this Court in *United States v. 12-200 ft. Reels of Super 8 mm Film*, slip opinion at page 7, footnote 7.

Respectfully submitted,



CHARLES H. KEATING, JR.,
Attorney for Appellee.

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tively prescribed one. See *Roth v. U.S.* . . . If subsection (10) were deleted from the statute, the situation would revert to what it was prior to its adoption, that is, the courts of this state could adopt the later pronouncements of the United States Supreme Court . . ."

it was never able to place that policy into effect.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

CHARLES H. KEATING, JR.,
Attorney for Appellee.

Certificate of Service.

I hereby certify that on this 19th day of July 1973, copies of the within Petition for Rehearing were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties requested to be served have been served.

ELMER GERTZ,
120 South La Salle Street,
Chicago, Illinois 60603.

CHARLES H. KEATING, JR.,
Attorney for Appellee.

APPENDIX H

COPY OF "PETITION FOR REHEARING" FILED BY APPELLEE OHIO EX REL CHARLES H. KEATING JR. IN 1973 IN A MOTION PICTURE FILM ENTITLED "VIXEN" ET AL V. OHIO EX REL. CHARLES H. KEATING JR. 413 U.S.905 (JUNE 25, 1973), REQUESTING A REHEARING BASED UPON THE ANALYSIS OF ASSOCIATE JUSTICE BURKE IN TRANS LUX DIST. CORP. V. BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK.

(Reference: Motion For Leave To Intervene and Petition For Writ Of Certiorari, at page 23).

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-599

A MOTION PICTURE FILM ENTITLED "VIXEN", RUSS MEYER, EVE PRODUCTIONS, INC., MALIBU, INC., AND CLARENCE P. GALL,

Appellants,

vs.

STATE OF OHIO, *ex Rel.* CHARLES H. KEATING, JR.,

Appellee.

Appeal From the Supreme Court of Ohio.

MOTION TO AFFIRM.

By letter dated January 12, 1972, Appellee was informed by the Clerk of this Court as follows:

> "The Court has directed this office to request that counsel for the appellee file a response in this case."

Pursuant to such request, Appellee submits the following response.[1]

[1]As a partial reply to Appellant's Jurisdictional Question No. 2, which attacks the constitutionality of the Ohio Nuisance Statute, O.R.C. section 3767.01 *et seq.* on its face, appellee has incorporated by reference in the argument hereinafter, the arguments made by him on that same issue in the Brief Amicus Curiae filed by him in *Grove Press Inc. et al. v. Anthony*

(This footnote is continued on next page)

During the past 15 years, a blanket of confusion has engulfed the motion picture production area and all but destroyed that industry's understanding of the public responsibility which it bears under this Nation's obscenity laws. Such confusion[2] is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to and brief reflection on the moral laws of this Nation dealing with sexuality, as codified by the state legislatures (see footnote 1 and Brief Amicus Curiae of Keating in Flask at Appendix E, pp. 1-11) is cogent proof that such public mores do presently exist and are well defined. See also, *City of Youngstown, Ohio v. DeLoreto*, 251 N.E.2d 291, 48 Ohio Op. 2d 393 at 400 (Sept. 10, 1969); *State of Ohio ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971); and *State of Ohio ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971).

B. Flask, et al., October Term 1970, No. 360, which case has been carried over to the 1971 October Term as No. 70-1. Copies of the Brief Amicus Curiae of Keating in Flask, hereinafter referred to by that title, have been served on Appellants concurrently with this motion, with such arguments appearing at pages 28-53 and 86-125.

[2]The Court in *People v. Kirkpatrick*, 316 N.Y.S.2d 37 (Oct. 28, 1970) had the following to say at page 42 on this general confusion as it related to the criminal law:

> "There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material 'Confusion now hath made its masterpiece' (Macbeth, Act II).
>
> "The confusion, in great measure, must be attributable to the incredible divergence of views of the men on the United States Supreme Court, to whom all look for guidance . . ."

The world famous "Hollywood" Blvd. named in honor of the motion picture industry has become "Hollywood Babylon." See Appendix E, pages 2-5.

The foundation for this confusion in the motion picture area was laid in this Court's treatment of the Lady Chatterly's Lover's appeal, reviewing the refusal of the New York Court of Appeals in *Kingsley International Pictures Corp. v. Board of Regents*, 165 N.Y. Supp. 2d 681 (July 24, 1957) to license the film "Lady Chatterly's Lover" as violative of Sections 122 and 122(a) of the New York Education Law. Those sections *required* the denial of a license to a motion picture, ". . . the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which, expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. . . ." Associate Justice Stewart's opinion in *Kingsley International Pictures Corp. v. Board of Regents*, 360 U.S. 684, 3 L.Ed.2d 1512, 79 S.Ct. 1362 (June 29, 1959), reversing the New York court's ruling (concurred in by Justices Brennan, Warren, Black and Douglas) is critically attacked by Terrence J. Murphy in his book, "Censorship: Government and Obscenity".[8] in Appellee's view, Terrence Murphy correctly points up the root of this Nation's present misery at page 183:

> "The Court went out of its way to find in the New York statute a prohibition of nothing more than an abstract expression of an idea. By culling out of the opinion of the lower court and emphasizing such phrases as 'a proper pattern of be-

[8]Chapter 12 of "Censorship: Government and Obscenity" entitled "Order and Morality" is reproduced hereinafter at Appendix E pages 6-13. Appellee submits that the persuasive nature of Terrence Murphy's Analysis and the history of succeeding events present grounds for a reappraisal of that decision. It bears mention that only three members participating in the "Lady Chatterly's Lover's" decision are sitting on the present Court.

haviour' Mr. Justice Stewart changed the New York law from a prohibition of the advocacy of sexual immorality plus obscenity to the prohibition of an intellectual discussion 'of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.' *Mr. Justice Stewart notwithstanding, a movie advocating adultery and using all the techniques of sound, color and sight to depict or suggest obscene sequences is quite different both in its social effects and in its manner of presentation from a film presentation of Henry George's antiquated theory of a single tax.*

The Court never met the argument that the state must protect 'order and morality.' New York argued that obscenity laws are ordered to the protection of the public interest in 'order and morality.' The corrupting influence on order and morality must be kept in mind in considering obscenity. To lose sight of the objective of the law by narrowly considering only the prurient appeal aspect of the obscenity law is to become so enarmored with a means as to lose sight of the end. Obscenity is prohibited not just because it excites the sexual appetite but rather because such excitation has a 'corrosive effect upon the public sense of sexual morality.'[20] The goal of the law is the protection of the public interest in order and morality. It cannot achieve this end if it does not concern itself with all the means by which the public order can be subverted. Consequently to hold as obscene that which is saturated with prurient sex while holding that material which advocates sexual immorality and is something less

> than saturated with prurient sex is not obscene is to close one avenue of attack on the community while opening up another route to the same destination . . ."

So that Appellee's analysis and contentions may be examined in proper prospective, Appellee has attached hereto at Appendix F pages 2-55 for this Court's benefit, a time-motion study of "Lady Chatterly's Lover", consisting of a chronological series of photographs, timed in their relative order of appearance, depicting the conduct visually portrayed in the film, "Lady Chatterly's Lover" and the philosophical issues raised in that case. The offending conduct appears at Appendix F, photographs 636 to 703, 796 to 876, 1075 to 1091 and 1258 to 1297. The "Lady Chatterly's Lover" issue was presented in civil litigation (involving no "mens rea" issue or criminal punishment) which, under one view, drew in issue the basic right of a state government to proscribe obscene conduct on the public screen—the very right upon which the Ohio Supreme Court relied in affirming the judgment of the Court of Appeals below. This Court should note that Associate Justice VanVoorhis of the New York Court of Appeals, a dissenter in the state court below, would have solved the "thought control" problem which bothered Justice Stewart by holding at 175 N.Y.Supp. 2d at 60:

> ". . . certain passages might have been eliminated as 'obscene' without doing violence to constitutional liberties. In their endeavor to censor morality, both the Motion Picture Division and the Regents seem to have overlooked their power to exclude 'obscenity' which includes the portrayal on the public screen of sexual intimacies *whether they be marital or extramarital* . . ." (Our emphasis.)

Appellee submits that had this Court's opinion in the "Lady Chatterly's Lover" case recognized the principle urged by Justice VanVoorhis and relied upon by the Ohio Supreme Court below, Appellant Russ Meyer would never have been seduced into gambling on his "Immoral Mr. Teas", "Lorna", etc. (see here the testimony of defense witness Arthur Knight appearing at Appendix C pages 2-72) and "Vixen" and its progeny would never have appeared as a plague on the American Courtroom scene.

This Court was presented with a second opportunity to undercut the advance of pornography in the motion picture industry when, during the 1964 October Term, the New York Court of Appeals' decision in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 N.Y.S. 2d 857 (Mar. 26, 1964) denying a license to the Swedish film, "A Stranger Knocks", appeared on this Court's docket. A time-motion study of the film, "A Stranger Knocks" is attached hereto at Appendix G pages 2-43 to refresh the recollection of those justices who voted in that matter and as a reference for those members of the present Court who were not then sitting. The latter film's only claim to fame was predicated upon two scenes depicting explicit sexual intercourse. The first took place on a beach (see Appendix G, photographs 644 to 711). The second was a 2-minute scene of sexual intercourse, including climax, between the male lead lying on his back on the couch with the female lead astride and on top of him, but with both parties fully clothed and the female's skirt concealing the contact of the sex organs (see Appendix G, photographs 1149 to 1249).

Justice Burke, speaking for the majority of the New York Court of Appeals below, in denying a license

to "A Stranger Knocks" adhered to the fundamental governmental principles relied upon by Terrence Murphy in his critical analysis of Justice Stewart's opinion in the "Lady Chatterly's Lover" case. Instead of granting a hearing and coming to grip with this very real issue in the *Trans-Lux* case, the 1964 Court chose instead to hear the appeal in *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (Mar. 1, 1965), struck down the Maryland Censor Board statute and summarily reversed *Trans-Lux*, citing *Freedman* as the basis for the reversal. *Trans-Lux Distributing Corp. v. Board of Regents*, 380 U.S. 2d 59, 13 L.Ed.2d 959, 85 S.Ct. 952 (Mar. 15, 1965). See Brief Amicus Curiae of Keating in Flask at page 109-110. Appellee would point out to this Court that it was Justice Burke's rationale in the *Trans-Lux* case below which the Ohio Supreme Court relied upon in affirming the "*Vixen*" decision of the Hamilton County Court of Appeals below. The Ohio Supreme Court noted in *Ohio ex rel. Keating v. "Vixen"*, 272 N.E.2d 137 at 140:

> ". . . the Supreme Court did not reach the substantive issue of speech versus conduct as applied to films by the New York Court of Appeals."

and phrased the rhetorical question:

> "Assume, hypothetically, that the main character in 'The Sound of Music' performs, during one scene an act of sexual lewdness. Could we permit that part of the film to go unregulated merely because the producer had 'an eye on the recent Supreme Court rulings?' The question supplies its own answer."

For failure of this Court to enunciate a judicial philosophy in conformity with traditional moral law,

this Nation finds its public mores in the year 1972—13 years after the "Lady Chatterly's Lover" decision and 7 years after the "A Stranger Knocks" ruling—in a state of collapse, and the motion picture industry dominated by pornographers and ruled by anarchy. With *Kingsley International Pictures Corp., supra,* as the foundation, and this Court's inaction in *Trans-Lux Distributing Corp., supra,* providing the mortar,[4] pornographers such as defendant producer, Russ Meyer, and his *alter ego,* defendant national distributor Eve Productions, Inc.; have constructed a modern-day version of the Tower of Babel[5] within the motion picture in-

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[4]Although *Jacobellis v. Ohio,* 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676 (June 22, 1964), also acted as a catalyst, that case did not, as did Trans-Lux, squarely draw in issue the fundamental right of state government to proscribe lewd acts. Jacobellis was an appeal from a criminal conviction which was dominated by the collateral "mens rea" issue.

[5]The brazenness of certain producers leads Appellee to conclude that such operators are convinced that the confusion is so great they can disregard the law. What the Court might now say, as for example, this Court's recent pronouncements in *United States v. Reidel,* 402 U.S. 351, 28 L.Ed.2d 813, 91 S.Ct. 1410 (May 3, 1971), and *United States v. 37 Photographs,* 402 U.S. 373, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971) does not bother them. It took two months of courtroom endeavor before Appellant in *Ohio ex rel. Keating v. Cinema International of Cincinnati, Inc., Court of Common Pleas, Hamilton County,* Case No. A261971 was able to secure injunctive relief from the Hamilton County Common Pleas Court in a petition filed on Nov. 17, 1971, under the Ohio Nuisance Statute, where the subject matter being exhibited at the downtown "Cinema X" Theatre involved conduct such as oral copulation of the male penis in the mouth of a female to the point of ejaculation. See Appendix H, pages 2-57, a time-motion study of the Cinema X program for the week November 17-23, 1971. The Common Pleas Court was inclined at first to listen to arguments based upon Justice Stewart's rationale in the "Lady Chatterly's Lover" case that such depictions (oral copulation) were "protected speech." In a similar vein see the Daily Variety Article of Feb. 18, 1972, page 3, reporting on the Los Angeles trial of Tom Parker, his sons Rick and Morrie, and their *alter ego,* the corporation Topar Films, reproduced hereinbelow, where defense attorneys were permitted to introduce

dustry. (See also Appendix E at pages 2-5 depicting Hollywood Blvd. today.)

Appellee submits that if this Nation is to continue its existence as a moral society, the fallacious reasoning expressed in the *Lady Chatterly's Lover* case must be re-examined. The federal questions spawned by that rationale require an immediate answer of unmistak-

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testimony of medical experts who testified that films which graphically depict sexual activities such as oral copulation have redeeming social importance and are necessary to maintain an open dialogue in the community regarding sexual matters! For a correct statement of the law see *Ohio ex rel. Sensenbrenner v. Adult Book Store*, 271 N.E.2d 13 at 29 (Mar. 2, 1971).

THREE ACQUITTED
OF CONSPIRACY TO
SELL OBSCENE FILMS

An acquittal in L.A. Superior Court yesterday of Topar Films and its three owners on charges of conspiracy to sell and distribute alleged obscene films and pandering may pave way for future acquittals in cases involving "adult films."

Although the jury found 49 films, all showing graphic sexual activity, including scenes of sexual acts and oral copulation, not obscene, two of the three defendants were convicted of two counts of oral copulation.

Films were seized by L.A. police last March 6 from Topar Films Inc. when they answered an ad offering the films for sale. Arrested at that time were Tom Parker, Topar prez, and his sons, Rock and Morrie.

Each faced charges of conspiracy to sell and distribute, two counts of pandering, conspiracy to commit oral copulation and commission of that act.

At the time the case was filed, district attorney's office said it would be the major obscene prosecution filed by that office.

In the pandering charges, defendants were accused of soliciting girls to work in movies and have them perform sexual acts, including oral copulation.

Defendants' attorneys Anthony Michael Glassman and Richard G. Hirsch introduced testimony of medical experts, all of whom testified that films which graphically depict sexual activities such as those shown to the jury have redeeming social value and are necessary to maintain an open dialog in the community regarding sexual matters.

(This footnote is continued on next page)

able clarity. That purpose can only be accomplished by this Court's squarely coming to grips with the problem in a factual setting devoid of collateral issues which detract from the main issue. While this Court has noted jurisdiction in *Washington v. Rabe*, 484 P.2d 917 (Apr. 6, 1971) involving the criminal conviction of the manager of an outdoor drive-in theater in Richmond, Washington, for exhibiting the motion picture film, "Carmen Baby", and is about to hear arguments in that case, the factual setting and the narrow grounds upon which that case was decided do not permit an examination of the basic issue raised by the Ohio Supreme Court herein, *i.e.*, the inherent right of a state government to enjoin the public display of lewd sexual conduct[8] on the motion picture screen.

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8 Films Shown Jury

The jury was shown eight films stipulated as being representative of the 49 offered for sale.

Prosecution witnesses testified they saw one of the defendants drive girls to the place where the movies were being made and saw the girls commit oral copulation on two of the defendants. It apparently was on this testimony that the father and son Morrie were convicted of the oral copulation charges. Rick was apparently not involved, nor were the girls charged.

Glassman said it is inconceivable to him how the jury could determine that the films were not obscene, yet part of those same films involves obscene acts. Conviction under Section 288 A, Oral Copulation, carries up to a 50-year sentence, Glassman said this will be basis for an appeal.

This court and the pornographers have the governmental attorneys chasing their tails. The City Attorney's Office in one large city is now looking for "experts" to rebut such testimonyl (*instead of objecting that the same is incompetent, irrelevant and immaterial and does not bear on any of the issues*).

[8]Associate Justice Hale in his concurring opinion in *Washington v. Rabe, (supra)* recognized that the majority's opinion did not meet the issue squarely, at page 926:

> "Although the Supreme Court of the United States, as is seen in the Court's opinion, has the last word on freedom of speech, I think it has no jurisdiction whatever under

In the *Rabe* case the picture screen of the outdoor theater faced 12 to 15 adjoining family residences and a portion of a nearby major highway so that pictures on the screen were visible to residents of those homes and their guests, to passing motorists upon the highway, and to those persons who would look at the screen from just outside the chain link retaining fence enclosing the theater grounds. The majority of the Washington court chose to decide the case on the much narrower issue of the "potential" audience among which were several groups of unwilling participants.

In concurring in the result reached in *Washington v. Rabe*, (but not the majority opinion), Associate Justice Hunter, in his separate opinion at page 926, would have gone further and affirmed on the grounds that "Carmen Baby" was obscene as to all audiences under the Washington State obscenity laws. Appellee submits that such a determination *in a criminal case* might very well have again opened up Pandora's Box in the closed conference room of this Court. See here *Cain et al. v. Kentucky*, 437 S.W.2d 769, involving a criminal conviction of the manager of the Crescent Theater in Louisville for exhibiting "I A Woman" (also, an Audobon film), reversed in *Çain et al. v. Kentucky*, 397 U.S. 319, 25 L.Ed.2d 334, 90 S.Ct. 1110, rehearing denied 397 U.S. 1081, 25 L.Ed.2d 819, 90 S.Ct. 1520 (Mar. 20, 1970) on the authority of this Court's no-clear majority decision in *Redrup v. N.Y.*, 386 U.S.

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the Constitution—except perhaps for the District of Columbia—to prescribe moral, literary or social standards for the country at large. The judicial duty to protect freedom of speech and press in the Nation at large imparts no correlative power to preserve obscenity and pornography in the states . . . A different rule I think, would constitute a direct attack on the ideas of self government."

767. (See footnote 10.) Appellee submits that the result in *Cain* should have been otherwise had the *sole* issue in that case been the right of the State of Kentucky, acting through its Court of Appeals, to enjoin the showing of "I A Woman" on the grounds that the public conduct displayed therein was in derogation of that State's basic moral laws regulating public conduct.[1] For the same reason, the issues in the *Rabe* appeal now before this Court would be totally different (as they are in the "Vixen" appeal) were the producers and distributors of "Carmen Baby", Radley Metzger, Ava Leighton and their *alter ego* "Audobon Films" before this Court on the injunction issue, for both "I A Woman" and "Carmen Baby" were cast from the same (Audobon) mold. See here the pictorial continuities for Audobon's previews for the film, "I A Woman" and "Carmen Baby" appearing at Appendix I pages 2 to 3, the pictorial continuity for "Carmen Baby" appearing at Appendix I pages 4 to 11 the pictorial continuity for "I, A Woman" appearing at Appendix I pages 12-21, and the *modus operandi* and history of Audobon Films, Inc., set forth in the preliminary prospectus filed with the Security and Exchange Commission on August 27, 1969, pages 1 to 12, which are reproduced at Appendix I, pages 22-33. At the time of "Carmen Baby's" appearance on the screen in 1967, the sexual depictions contained therein were regarded as every bit as pornographic as the sexual scenes in

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[1]Justice White and three other justices not now sitting (Justices Warren, Clark and Harlan) recognized this distinction in their dissenting votes in *Tralins v. Gerstein*, 378 U.S. 576, 12 L.Ed.2d 1033, 84 S.Ct. 1903 (June 22, 1964), and *Grove Press, Inc. v. Gerstein*, 378 U.S. 577, 12 L.Ed.2d 1035, 84 S.Ct. 1909 (June 22, 1964) where the sole issue before the Court was the right of the state court to enjoin such distributions.

"I Am Curious (Yellow)". Compare Appendix I pages 4 to 11 with the photographic continuity for "I Am Curious (Yellow)" appearing in Brief Amicus Curiae of Keating in *Flask* at Appendix A, pages 2 to 9 and note in particular at Appendix I photographs 110 to 123 depicting fellatio. If this Court does not roll back the pages of history to correct its erroneous opinion in the *Lady Chatterly's Lover* case, those scenes will next appear on television, as both Russ Meyer and Radley Metzger have personally stated for the record.

If this Court has no empathy with panderers like Russ Meyer and Eve Productions Inc., and it appears certain at this point that such is the case,[8] then this Court should grant plenary review herein and resolve, once and for all, the merits of the Ohio decision enjoining the conduct of defendant producer Russ Meyer, and his *alter ego*, defendant exhibitor Eve Productions, Inc. A continuity on "Vixen" is incorporated herein at Appendix A, pages 2 to 71 to permit this Court to reflect on Meyer's "production".[9] See also footnote 1

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[8]See *Samuel Roth v. U.S.* and *David Alberts v. Calif.*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) *Ralph Ginzburg v. U.S.*, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942; *rehrg. den.* 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440, and *Ralph Ginzburg v. U.S.*, 436 F.2d 1386, pet'n for cert. to the U.S. Court of Appeals, 3rd Circuit, denied in 402 U.S. 976, 29 L.Ed.2d 709, ... S.Ct. ....., rehrg. den. 404 U.S. 875, 30 L.Ed.2d 121, ...S.Ct. ..... (Oct. 12, 1971); *Mishkin v. N.Y.*, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, *rehrg. den.* 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440; *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (May 3, 1971); *United States v. 37 Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 May 3, 1971); *Grove Press, Inc. v. Maryland State Bd. of Censors*, 258 A.2d 240 (Oct. 22, 1969), aff'd by a divided court in *Grove Press, Inc. v. Maryland State Bd. of Censors*, 401 U.S. 480, 28 L.Ed.2d 205, 91 S.Ct. ..... (Mar. 8, 1971)

[9]The term "continuity," as used in this brief is adapted from its parallel use in the motion picture industry.

(This footnote is continued on next page)

and the Keating Brief Amicus Curiae at Appendix D, pp. 1-14 for a photographic continuity on "Vixen," to be compared with the photographic continuity on "I Am Curious Yellow" in the Keating Brief Amicus Curiae in Flask at Appendix A, pp. 1-11. In this regard, the Court should closely examine the testimony of Meyer's own witness, Arthur Knight reproduced herein at Appendix C pages 2-72 which describes producer Meyer as the producer of "the very first skin flick or sexploitation film in the development of what one might call erotica in the modern motion picture distribution" "which film marked the turning point" (229): describes his films as "the best of the worst and the worst being the skin flicks" (269) and acknowledges Meyer's contribution to be that of turning "out a film that is superior to what those films had

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A motion picture film production crew commences operations with a movie script. When the film is completed, a final sound track is made and appropriate corrections made to the original script, to arrive at what is termed a "continuity." Thereafter, when any controversy arises over lines, stage action, etc., the "continuity" is taken out of its file for examination. The industry does not go to the film for its analysis—it refers to the continuity for a quick and accurate response.

The "continuity" contains an accurate reproduction of the *sound* portion of the film, identifying the actors, their roles and what they say as the film progresses. In addition, selected *visual* screen depictions are captured by a still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance (or exaggeration) for the benefit of the justices censoring this appeal.

The inability of the mind to recall accurately and chronologically the rapidly moving visual and audio "facts" presented in a motion picture film point to the need for recording accurately, as much of the factual material as is possible, for use in conjunction with the principle of "past recollection recorded." As that concept has utility for purpose of oral argument. With the latter accessory, an intelligent analysis and examination of the film based on its content is possible.

been, and so there is an improvement in quality that has allowed them to move out of the grind houses . . . into the neighborhood houses." (267). Arthur Knight's testimony tells the history of the sexploitation film and Russ Meyer's primary role therein which indicts Meyer as a panderer the equal of *Roth, Alberts, Ginzburg, Mishkin, et al.*

If certain members of this Court have difficulty resolving criminal cases in this area because of the *mens rea* requirement,[10] then certainly the civil abatement statute is the proper forum for considering the constitutional issue raised by Associate Justice Hale of the Washington Supreme Court in his concurring opinion in *Washington v. Rabe* (see *supra*, Note 6).

Several years ago Appellee was privileged to hear the remarks of Dr. Melvin Anchell,[11] a practicing psychiatrist, discussing the corruptive effect of pornography on society at large. In Appellee's view, Dr. Anchell's scientific remarks as to the psychiatric aspects regarding the detrimental effect of obscenity on society as a whole presented strong corroboration for the time-honored Anglo-Saxon, Judeo-Christian judicial public policy against obscenity. Convinced that if anything could move certain members of this Court away from their previous irreconcilable positions, it would be Dr.

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[10]See *Redrup v. N.Y.*, petition for certiorari granted in 16 L. Ed.2d 438 on Apr. 25, 1966, but limited to the scienter issue. Redrup was finally resolved in a "per curiam" "no-clear majority" opinion in 386 U.S. 767, 18 L.Ed.2d 515, 87 S.Ct. 1414, involving four different individual interpretations of seven justices as to what the obscenity statutes could encompass, one of which (adhered to by two of the seven justices) refused to follow the long-standing constitutional determination that obscenity was *not* constitutionally protected.

[11]See also "Sex and Sanity" by Melvin Anchell, M.D. published by the Macmillen Company (1971).

Anchell's "common sense" testimonial evidence,[12] appellee offered such testimony in the trial below. Trial Judge Leis was sufficiently impressed to incorporate a narrative summary of Dr. Anchell's testimony in his opinion. See Appendix A, page 10, of Appellant's Statement as to Jurisdiction. That narrative summary is set forth hereinafter in full:

> "Dr. Melvin Anchell, called as an expert witness by the plaintiff, explained to the Court how human sexuality functions between men and women in society today, and what was meant by sexual perversion, and distinguished between human sexuality and perverted sexuality. He stated that 'Vixen' did not treat nymphomania in a realistic fashion; that the picture portrayed serious misconceptions in that it showed woman with an intense sex drive, which is a fallacy; that the female was illustrated as endowed with a male lust; and that the female of the human species is depicted as even sexier than the male, ready to rape him at the slightest provocation; that this unrealistic hoax that has been perpetrated on the unsuspecting public was one of the major unrecognized causes of the marital discord and for the general public belief that women have the same, if not greater desire for sexual intercourse as men.
>
> "He stated that films like 'Vixen' have a noticeable influence on the established social patterns and values and that never before in history has

[12]This Court has previously seen the merit in such logic. See *Sam Ginsberg v. N.Y.*, 390 U.S. 629, 642, fn. 10 (Apr. 22, 1968), citing with apparent approval similar remarks of Dr. Gaylin of the Columbia University Psychoanalytic Clinic, regarding the "indirect effects" of allowing pornography to exist in the Community.

a culture been so overwhelmingly and continuously exposed to abnormal and perverted sexual activities as they are today through the entertainment media.

"He further stated that modern youth cannot attend a movie without being flooded with perverse information; that the entertainment media have more influence on the behavior of the younger generation than the family, church, or established social patterns, and that this media accounts for much of the increase in perversion today; that it is virtually impossible for the inexperienced youthful mind properly to evaluate these portrayals, and that the young person identifies himself or herself with the hero and heroine who presumably represents adult pleas that the movies showing natural or unnatural genital sex activity as mature adults, make polymorphous male and female prostitutes out of young people and often cause adults to regress to the exhibitionism, voyeurism stage, or to indulge in other perversions; that the manner in which incest and lesbianism are depicted on the screen in 'Vixen' has a corruptive effect on youths over 18, and adults, and society in general, and is damaging to public morals and welfare; that the various visual and audio depictions presented in the sexual relations above set forth in detail have a corruptive effect on society; that such depiction in the mass media are currently spreading psychological venereal disease throughout the nation; that the sexual misconception illustrated in the picture have a corruptive effect on society."

Because Appellee feels Dr. Anchell's testimony is itself a strong argument in favor of this Court accord-

ing a full hearing to the issues in this case, such testimony is set out in full at Appendix B, pages 2-95.

Were this Court to decide this appeal without full briefing and argument and a written opinion of the Court, little good would be done toward advancing an understanding in this area of the law. Such was the manner in which this Court ruled in the only motion picture case in which a film was held to be obscene by this Court in recent history. See *Landau v. Fording*, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 3109; *rehearing denied* 389 U.S. 889, 19 L.Ed.2d 199, 88 S.Ct. 16, (June 12, 1967), in which certiorari was granted and the judgment below summarily affirmed on the merits without briefing, oral argument or opinion. That decision has long since lost its identity.[18]

For all of the reasons given above, Appellee respectfully moves this Court to consider the judgment of the Ohio Supreme Court below on the merits, and to affirm the same in a written opinion after briefing and argument on two critical issues ruled upon therein: (1) the fundamental right of a state court to enjoin obscene conduct on the screen—conduct which, by its nature, is regarded as contrary to the public mores established by the state legislature and state judicial system and (2) the relevance of the factor "social importance" to the constitutional standard governing the proscription of obscenity.

Respectfully submitted,

CHARLES H. KEATING, JR.,
Appellee.

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[18]That film (silent), "Un Chant D'Amour," was described in detail in *Landau v. Fording*, 245 Cal.App.2d 820, 54 Cal.Rptr. 177. A photographic continuity of "Un Chant D'Amour" is incorporated herein at Appendix J pages 2-15. The California court's opinion appears at Appendix J, pages 16-22 and this Court's "per curiam" affirmance at page 23.

APPENDIX I

(A) COPY OF NEWS ARTICLES IN LOS ANGELES TIMES, DATED DECEMBER 11,1987, REPORTING ON ORAL ARGUMENTS BEFORE THE CALIF. SUPREME COURT IN PEOPLE V. FREEMAN, AND THE QUESTIONS POSED BY JUSTICES KAUFMAN AND PANELLI OF THE ASSISTANT ATTORNEY GENERAL.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 34).

(B) COPY OF NEWS ARTICLE IN LOS ANGELES TIMES, DATED NOVEMBER 18, 1987, REPORTING ON FEDERAL CIVIL RIGHTS LAWSUIT BROUGHT BY "CALL GIRL" ALMODOVAR AND FILM MAKER BULLARD CHALLENGING THE USE OF PENAL CODE SECTION 266(i) AGAINST THE MAKERS OF PORNOGRAPHIC FILMS.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 43).

★ Friday, December 11, 1987 / Part II 3

Sex-Film Producer's Prosecution Argued Before High Court

2926

By PHILIP HAGER, *Times Staff Writer*

SAN FRANCISCO—A state prosecutor encountered a barrage of skeptical questions Thursday from the California Supreme Court as she defended the precedent-setting use of an anti-pandering law to prosecute a Los Angeles sex-film producer.

Court members repeatedly expressed concern that using the 1982 law against film makers would violate the constitutional right to free expression and threaten the movie industry in California.

But state Deputy Atty. Gen. Lauren Dana argued that there is nothing unconstitutional in prosecuting producers who pay performers to commit sex acts on film, which she said amounts to prostitution. Such prosecutions, she said, could help stop the spread of AIDS and other sexually transmitted diseases among performers in pornographic films.

'Paid People to Act'

A lawyer for Harold Freeman, producer of more than 10[illegible] full-length sex movies who faces trial under the pandering law, contended that if Freeman can be charged, so could the makers of first-run films or even the producers of sex-education movies.

"Mr. Freeman paid people to act," said his attorney, Dennis A. Fischer of Santa Monica. "He did so for the undeniable purpose of creating a film—not to provide for sexual gratification . . . as do those who promote prostitution."

The proceedings were marked by lively exchanges and graphic descriptions as the court heard arguments in a far-reaching test of law enforcement objectives and constitutional guarantees.

In the case at issue, Los Angeles authorities invoked the pandering law—ordinarily used as a weapon against street pimps—to prosecute Freeman for hiring actresses for up to $800 a day to perform explicit sex acts in a movie called "Caught From Behind II."

Freeman, a prominent figure in Los Angeles' $500-million-a-year adult-film industry, was convicted of the charge in 1985. But a trial judge in Van Nuys refused to impose the three-year minimum prison term, sentencing Freeman instead to 90 days in jail and a $10,000 fine. The validity of the sentence is pending in a separate case before the court.

In Thursday's hearing, court members peppered prosecutor Dana with questions about using the law against movie producers.

Justice Edward A. Panelli noted that there was a "significant difference" between prosecuting a producer who films an illegal act—such as unlawful intercourse with a minor—and one who films an act between consenting adults that in itself is not illegal.

"Isn't the problem that a lot of our major, first-run films could be prohibited if you're correct?" Panelli asked Dana.

The state's attorney replied that the court could limit such prosecutions to the filming of actual sexual intercourse, thus avoiding that problem.

"So courts can decide what deserves an R rating and what deserves an X rating?" Justice Stanley Mosk asked skeptically.

"The industry would know full well what would be permitted," Dana said. "It would not prohibit touching or caressing, for example."

Pressing the point, Justice Marcus M. Kaufman asked how producers could make sure their filmmaking was legal.

Dana answered that they could employ simulated sex, rely on unpaid "volunteers" as performers or "film it in Nevada—where prostitution is legal."

When Dana conceded that under the state's theory, the filming of illegal gambling could be prosecuted if it were real gambling, Mosk remarked: "You're going to drive motion pictures out of Hollywood with that attitude."

Similarly, Appellate Justice J. Anthony Kline, appointed temporarily to sit in the case, raised the possibility that if the prosecution of Freeman were upheld, it would open the way for charges against the makers of films like "The Graduate," "Midnight Cowboy," and "Last Tango in Paris."

Fischer stressed to the justices that the law was not intended to be used against movie producers and that Freeman's prosecution "may be a way of getting at the adult film industry" where efforts to prosecute under obscenity laws have proved unsuccessful.

Even if prosecution were limited to instances involving actual intercourse, it would still violate the First Amendment, Fischer said. He suggested for instance that the law might be employed against film makers who pay performers in sex-education movies.

Top state court sympathetic to sex-filmmaker challenge

NEWS / FRIDAY, DECEMBER 11, 1987 / DAILY NEWS

By BOB EGELKO
Associated Press

SAN FRANCISCO — A sex filmmaker's challenge to his precedent-setting prosecution on pandering charges got an apparently sympathetic response from the state Supreme Court Thursday.

"A lot of our major first-run films would be prohibited" if paying actors to perform sexual acts for a movie was considered pandering, Justice Edward Panelli told a prosecution lawyer.

When Deputy Attorney General Loren Dana said major studio films would be safe from prosecution because they generally used simulated sexual intercourse, Panelli questioned the legal distinction and a defense lawyer said it was irrelevant.

Paid actors whose roles include sexual acts, actual or simulated, are not engaged in prostitution, and the film producer who pays them is not a panderer, said Dennis Fischer, lawyer for producer Harold Freeman of Encino.

Prostitutes "solicit sex for money," Fischer said. "A prostitute and a customer must exist ... and the object of that transaction is sexual gratification.

"... Mr. Freeman paid actors to act. The object was to make a film, not sexual gratification."

The court heard an hour of arguments and will rule at a later date.

Freeman's 1985 conviction on pandering charges, for paying actors and actresses to engage in actual sexual intercourse for the filming of a movie called "Caught From Behind, Part II," is a test case for Los Angeles County's attempt to use pandering laws against the sex-film industry.

Rather than trying to prove a film obscene, generally a difficult task, or reserving prosecution for those who employ minors, the District Attorney's Office is contending that producers are guilty of pandering when they pay actors and actress to perform actual sexual intercourse on camera.

Pandering, a felony, is punished by a mandatory state prison sentence of at least three years. But in Freeman's case, Superior Court Judge James Albracht said the producer's conduct was not as serious as the type of pandering associated with street prostitution, and sentenced him to 90 days in jail.

The conviction and sentence were upheld by a state appeals court that included Justice John Arguelles, who has since been named to the Supreme Court. Arguelles voted to uphold the conviction but dissented from the sentence, saying a prison term was warranted; he did not take part in Thursday's hearing.

In defending the conviction, Dana said the constitutional right of free expression would not protect a producer from prosecution for an actual crime, such as murder, committed on stage. Paying actors to perform sex is equally criminal, she said.

But Justice Marcus Kaufman noted that unlike a murder, the acts in Freeman's film "were not independently criminal, other than for

Los Angeles Times Wednesday, November 18, 1987 ★

Court Revives Suit Attacking Use of Pandering Laws Against Porn Films

By KIM MURPHY, *Times Staff Writer*

A federal appeals court Tuesday reinstated a civil rights lawsuit filed by a Los Angeles traffic officer-turned-call girl challenging the use of prostitution and pandering laws against pornographic film makers.

In a unanimous decision, the U.S. 9th Circuit Court of Appeals said there was room for First Amendment challenges to prosecutions under the statutes but said the federal courts should first allow the California Supreme Court to rule on the question.

The decision reinstates a lawsuit filed by Norma Jean Almodovar, a former civilian traffic control officer later convicted of prostitution, and film maker R.N. Bullard, who sought to make a movie graphically depicting "safe sex" practices, but said they feared they would be prosecuted.

Recent Crackdown

The suit challenges a recent crackdown against Los Angeles-area adult film makers and actors under state pandering and prostitution laws, which local law enforcement authorities say apply to the production of sexually explicit films because they make it illegal to receive money in exchange for sex.

The appeals court did not rule on the merits of the suit, under which Almodovar and Bullard are seeking to bar future prosecutions, but the plaintiffs' lawyer claimed a measure of victory in the court's pronouncement that the pandering and prostitution statutes are "susceptible" to a much narrower interpretation.

"Certainly, the requirement that sex be exchanged for money to constitute prostitution might be limited so as not to include performance before a camera," Judge Dorothy W. Nelson wrote for the court.

Pandering Conviction

However, the court said the state Supreme Court should decide on how broadly to interpret the statutes before the federal courts intervene.

In a case now pending before the Supreme Court, Los Angeles film maker Harold Freeman is challenging his pandering conviction for hiring actresses to perform sex acts in one of his films.

"If the California Supreme Court decides that the Legislature did not intend the prostitution statute to apply to films, Almodovar will have obtained all the relief she seeks without a federal decision on her constitutional claims," the appeals court said.

At the same time, by reversing a district judge's earlier dismissal of the case, the court left open the possibility that Almodovar and Bullard could challenge the statutes in federal court should the Supreme Court uphold the conviction.

"I think it's very good for us," the plaintiffs' attorney, Stanley Fleishman, said of the ruling.

'Something to Our Argument'

"We were claiming that the use of the pandering and prostitution laws was improper, and while the 9th Circuit obviously didn't attempt to answer the question, they certainly suggested that there's something to our argument, and that the statutes may have been used in an over-broad fashion," Fleishman said.

Deputy City Atty. Jack L. Brown, representing the Los Angeles Police Department, who with the district attorney's office was a defendant in the suit, said city and county officials have argued that use of the pandering and prostitution statutes does not violate film makers' First Amendment rights.

"The First Amendment can't operate to shield acts which otherwise are criminal, just because you're filming something," Brown said.

APPENDIX J

COPY OF DEFENSE ATTORNEY'S " MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS" 5 SEPARATE GROSS MISDEMEANOR COUNTS WHICH ALLEGED VIOLATIONS OF THE MINNESOTA BESTIALITY STATUTE, INCIDENT TO THE PRODUCTION OF A VIDEO TAPE INVOLVING SEXUAL INTERCOURSE WITH A ROTWEILLER DOG.

(Reference: Motion For Leave To Intervene and Petition for Writ of Certiorari, at page 40).

STATE OF MINNESOTA — FOURTH JUDICIAL DISTRICT COURT

COUNTY OF HENNEPIN — DIVISION FOUR -- EDINA

State of Minnesota,

Plaintiff,

vs.

Robert Walter Bonynge,

Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION

File No.

ARGUMENT

I. MINNESOTA STATUTES SECTION 609.294, TO THE EXTENT THAT IT AGGRAVATES CRIMINAL PENALTIES FOR ENGAGING IN ACTIVITY ENTITLED TO FIRST AMENDMENT PROTECTION, IS FACIALLY UNCONSTITUTIONAL AND UNCONSTITUTIONAL AS APPLIED, IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 3 OF THE MINNESOTA CONSTITUTION.

As already noted, supra, Minnesota Statutes Section 609.294 makes bestiality, to-wit: carnally knowing an animal, a misdemeanor offense. However, if the same

act is committed in the presence of another person, the act becomes a gross misdemeanor. In the instant case, Defendant's gross misdemeanor charges, especially in Counts 2 through 5, arise because the Defendant engaged in the process of hiring other persons to engage in bestiality, for the purpose of reproducing that act on video tape as a motion picture film. Thus, Defendant's act of recruiting and filming sexual activity results in aggravated criminal penalties, despite the fact that Defendant's action was done for the purpose of production of a motion picture film, presumtively entitled to the protection of the First Amendment, unless and until it is established that the film is obscene.[1] See Joseph Burstyn, Inc. v. Wilson, 343 U.S.

[1] In the instant case, Defendant is not charged with obscenity, and the complaint makes no allegation that the film in question violates any state obscenity laws.

495 (1952); Freedman v. Maryland, 380 U.S. 51 (1965); and Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W. 2d 370 (1975). Such aggravation plainly violates the First Amendment.

Directly on point in this regard is the recent decision of the California Supreme Court in People v. Freeman, _____ Cal. 3d _____, _____ Cal.Rptr. _____, _____ P.2d _____ (August 25, 1988), in which the California Supreme Court held unconstitutional criminal prosecution of Defendants for violating the state statute on pandering prostitution, when the alleged prostitution amounted to payment to actors and actresses in sexually explicity motion picture films, involving the performance of live sex acts on screen. A copy of the slip opinion of the California Supreme Court is attached hereto as Exhibit A and incorporated by reference as if fully

set forth herein.

In reversing criminal convictions for pandering prostitution, based upon hiring actors and actresses to perform in sexually explicit films, the Supreme Court of California held that "the application of the pandering statute to the hiring of actors to perform in the production of a non-obscene motion picture would impinge unconstitutionally upon First Amendment values." Id., Slip Op. p. 7. In so concluding, the court stated:

> "Since the acts involved here have not been judged obscene, they are within the protection of the First Amendment. To subject the producer and director of a non-obscene motion picture depicting sexual conduct to prosecution and punishment for pandering, including the special provision for ineligibility for probation attendant on such a conviction (citation omitted), would rather obviously place a substantial burden on the exercise of First Amendment rights. To include the hiring and paying of actors for acting in such a film within the

> definition of pandering would therefore unconstitutionally infringe in First Amendment liberties...We observe that if Section 266i were applied in the manner urged by the People, it would include within the literal sweep of the statutory language films of unquestioned and artistic social merit, as well as films made for medical or educational purposes." Id. at pp. 9-10.

To be sure, the California Supreme Court reaffirmed an earlier holding that merely because a criminal act takes place during the filming of a motion picture does not absolve the actors of liability for otherwise criminal conduct. However, in the context of the instant case, the following language of the court's opinion is instructive:

> "Undeniably, one cannot lawfully hire another to commit murder, rape or robbery for the purpose of photographing the act. Murder, rape and robbery and aiding and abetting intercourse for that matter, are crimes independent of and totally apart from any payment for the right to photograph the conduct.
>
> By contrast the acts of alleged 'prostitution' in this case were

> not crimes independent of and apart from payment for the right to photograph the performance. The determination that pandering and prostitution occurred here was entirely dependent on the payment for the right to photograph. Indeed, under the People's theory the payment was used to establish not only the 'hiring' but also the elements of both the 'pandering' (procuring) and the 'prostitution' (i.e., lewd acts 'for money'). When considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful." Id. at 15.

In the instant case, it is clear that the act of carnally knowing an animal is itself unlawful, so that criminal liability might be imposed, even though Defendant hired the individual, for the purpose of filming it. However, it is absolutely clear that the aggravation of the criminal act for the simple misdemeanor to a gross misdemeanor is absolutely contingent upon Defendant's conduct in filming the act. Defendant becomes the "other person" for the purpose

of aggravating the act to a gross misdemeanor. Thus, although simple misdemeanor criminal liability might lie, regardless of whether or not an act was filmed or photographed for First Amendment purposes, the aggravation to the act to gross misdemeanor purposes is directly tied to the exercise of First Amendment rights of filming. As a result, although misdemeanor criminal liability might be imposed in such conduct, the aggravation to gross misdemeanor conduct is every bit as violative of First Amendment rights as was the pandering of prostitution charges in Freeman.

APPENDIX K

COPY OF STATUTES AND RULES OF COURT INVOLVED IN THE MOTION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI.

(Reference: Motion For Leave To Intervene, and Petition For Writ of Certiorari, at page 7-8).

JURISDICTION ON WRIT OF CERTIORARI

Rule 17

Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Rule 20

Review on Certiorari—Time for Petitioning

.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals or a decision of the United States Court of Military Appeals (see 28 U. S. C. Sec. 1259) rendered after June 1, 1984, shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for

applying for a writ of certiorari in such cases for a period not exceeding 30 days. [Rule 20.1 as amended 7/5/84, effective 8/1/84.]

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

§ 266i. [Pandering]

Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years.

Rule 24. Decision of reviewing court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a

decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

Rule 25. Remittitur

(a) [Issuance and transmission] A remittitur shall issue after the final determination of any appeal, or of any original proceeding in review in which an alternative writ or order to show cause has been issued. Unless otherwise ordered, the clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a Court of Appeal shall issue the remittitur upon the expiration of the period during which a hearing in the Supreme Court may be determined, including any extension of such period granted in the particular cause. The remittitur shall be deemed issued on the clerk's entry thereof in the register, and shall be transmitted immediately, with a certified copy of the opinion, to the lower court or tribunal. Whenever the judgment of the reviewing court changes the length of a sentence to state prison or changes the credits applicable thereto, or changes the maximum permissible period of confinement of a person committed to the custody of the Youth Authority, without requiring further hearing in the trial court, the clerk of the reviewing court shall also transmit a copy of the remittitur and the opinion to the Department of Corrections or to the Youth Authority.

Rule 27. Rehearing in court rendering decision

(a) [Power to grant rehearing] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.

(b) [Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision.

No. 88-1050

Supreme Court, U.S.
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CLERK

In The Supreme Court of the United States

October Term, 1988
No. 88-1050

KAREN APPLEGATE and PHIL APPLEGATE, individually, and as parents of the late COLLEEN APPLEGATE, aka "SHAUNA GRANT",

Petitioners,

vs.

People of the State of California, and HAROLD FREEMAN,

Respondents,

vs.

JOHN VAN DE KAMP, Attorney General of the State of California, IRA REINER, District Attorney of Los Angeles County, JAMES K. HAHN, City Attorney of the City of Los Angeles,

Real Parties In Interest,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

ARGUMENT

On February 1, 1989 Associate Justice O'Connor filed her opinion as the Circuit Judge for the 9th Circuit, which denied Los Angeles County District Attorney Ira Reiner's application for the issuance of a stay. A copy of Circuit Justice O'Connor's opinion is attached at Appendix A to this brief. Petitioners' Supplemental Brief is addressed to Justice O'Connor's conclusions in that opinion.

I

THE CALIFORNIA SUPREME COURT'S ANALYSIS OF THE PANDERING PROVISION OF STATE PENAL CODE SECTION 266i DOES NOT CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION.

(A) THE CALIFORNIA SUPREME COURT DID NOT CONSIDER OR DISTINGUISH THE IMPLICATIONS OF PEOPLE OF THE STATE OF CALIFORNIA V. JAMES MARVIN SOUTER, JR. (dba JAMES SOUTH OF WORLD MODELING AGENCY IN FREEMAN) ET AL. 178 CAL. RPTR. 111, HEARING DENIED BY THE CALIFORNIA SUPREME COURT ON JANUARY 27, 1982.

A copy of the Souter opinion is attached at Appendix B-1 through B-19 to this brief. In that case, the Appellate Courts in California addressed the identical facts, one of the identical actors (James South of World Modeling Agency), the identical issue, and the same type of argument which was before the 1988 California Supreme Court in People v. Harold Freeman 46 Cal.3d 419. See Appendix B-7 to this brief wherein the Souter Court stated the single issue to be:

> ISSUE PRESENTED
> THE ISSUE PRESENTED IN THIS APPEAL IS WHETHER PERSONS WHO PAY OTHERS TO PERFORM SEXUAL ACTIVITIES IN MOTION PICTURES CAN BE PROSECUTED FOR PANDERING UNDER SECTION 266i?

Unlike the Freeman Court in 1988, the Souter Court in 1982 (including the California Supreme Court, sub silentio) applied a "limiting construction" to California Penal Code section 266i and resolved the constitutional question

which, notwithstanding the full and complete answer which was given in Souter, was raised for a second time in Freeman.

Because the Souter case was before the California Appellate Courts in 1982 on a Motion to Dismiss an Information before trial, the Souter Court of Appeal was afforded, and did avail itself of the opportunity to construe Penal Code Section 266i in a way that resolved the hypothetical constitutional problem that "troubled" and "confused" the California Supreme Court Justices in Freeman, supra. The procedural advantage of Souter over Freeman is the same procedural advantage that Frisby et al. v. Schultz and Braun 487 U.S. ____, 101 L.Ed.2d 420 at 430 (June 27, 1988) enjoyed on appeal over Dombrowski v. Pfister 380 U.S. 496 (1965) at footnote 7. In Frisby, Justice O'Connor, writing for a majority of this Court, gave the City Ordinance a "limiting

construction" before it had been applied. The Souter Court did likewise. See that Court's opinion at Appendix B-12 to B-14 and B-15 to B-17 to this brief. Note in particular that Court's "limiting construction" reading:

> In the instant case, there is no such factual dispute as was present in Hill. The testimony at the preliminary hearing was unrebutted as to the type of activity in volved in these films--sexual intercourse and oral copulation. Consequently, we need not refer to that part of section 647, subdivision (b), which states that "prostitution includes any lewd act between persons for money or other consideration."
>
> Section 266i contains no definition of prostitution. Section 647, subdivision (b), states "[a]s used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration." (Emphasis added.) The language of section 647, subdivision (b), is expressly limited to that subdivision by its own terms and should not be read into section 266i in the absence of a specific reference.
>
> In our view, the term "prostitution" as used in section 266i means performing acts of sexual intercourse for compensation. It is not our intent to set forth a definition of prostitution and to state

> all the possible variations of activity which could be encompassed within the term. We approve the definition set forth in Black's Law Dictionary (5th ed. 1979), which states at page 1100, "Prostitution is performing an act of sexual intercourse for hire, or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire." This is a clear and concise definition of the term prostitution which is not subject to question and which would include within its meaning both acts of sexual intercourse and oral copulatoin as is present in the instant case.
>
> Thus, section 266i is violated if a person procures another person to commit an act of sexual intercourse or oral copulation for compensation.

Unfortunately, the "limiting construction" rule of law adopted in People v. Souter, supra, could not be brought to the attention of the Justices on the 1988 California Supreme Court because the attorneys for the People of the State of California were barred from doing so due to: (1) the ambiguous "depublication" action taken by the 1982 California Supreme Court, and (2) Cali-

fornia Rule of Court 977(a). In denying the petition for a hearing in Souter, the California Supreme Court ordered that the Souter opinion not be officially published, as ordered by the Court of Appeal. See the footnote in the Souter opinion at Appendix B-1 to this brief. Rule 977(a), which provides that an opinion that is not ordered published should not be cited or relied upon by a court or a party in any other action or proceeding except as provided in certain exceptions set forth at subdivision (b), compounded the problem. Because of the depublication in 1982, the People were precluded from citing to the 1988 California Supreme Court the very precedent which, under the doctrine of stare decisis, should have decided the issue and settled the appeal. Rule 977(a), as applied to the law and facts in People v. Souter, presents a clear case of denial of due

process of law and constitutional infringement.

Why the Court of Appeal opinion was ordered depublished in 1982 in Souter, supra, is not known.

It should be observed that, under California Rule of Court 976(b)(1), a Court may not order an opinion published unless it establishes a new rule of law, etc. See "Rules for Publication of Appellate Opinions" at Appendix C-1 through C-6 to this brief. Under one interpretation of People v. Souter, supra, that opinion merely applied an existing rule of law. See, in that regard, the Souter court's reference to People v. Fixler 56 Cal.App.3d, 321, 128 Cal. Rptr. 363 (Mar. 17, 1976), hearing denied by the California Supreme Court on May 14, 1976 (which is set forth at Appendix B-17 and B-18 to this brief).

However, viewed more precisely as an example of an opinion which applies a "limiting construction" of the type engaged in by this Court in Frisby et al. v. Schultz and Braun, supra, it appears to meet the criteria of Rule 976(b)(1). It would appear that such may have been the analysis of the Court of Appeal in Souter, supra, and the grounds upon which it certified the opinion for publication in the first instance. In such a case, it should have been published.

The California Supreme Court's practice of issuing depublication orders, because the opinions do not meet the criteria of California Rules of Court 976(b), has come under attack from commentators since the early 1970's. See "California Civil Appellate Practice, Second Edition," (Continuing St. Bar 1985) at 521-532. A copy of the Continuing Education of the Bar's analysis

is set forth at Appendix D-1 through D-12 to this brief. Certainly, in this case, the depublication has worked a severe injustice to the People of the State of California. A "limiting construction" rule of law (which was on review to the California Supreme Court under the then mandatory rules of review) was deprived of its "stare decisis", precedent status by an ambiguous order of depublication. See, in this regard, the text "Section 20.10 G. Effect of Supreme Court Order" at Appendix D-8 through D-10 to this brief.

It would appear that, due to the above unusual trial facts, and the denial of a hearing on January 27, 1982, the opinion in People v. Souter 178 Cal. Rptr. 111 must be construed as a "determination" of the California Supreme Court, and not merely as another case

of a decision by a Court of Appeal as to which the California Supreme Court has denied a hearing, for the following reasons: California Constitution Art VI section 14 required that the California Supreme Court's decision on the "limiting construction" on the appeal in People v. Souter be in writing with the Court's reasons stated. See the text in "Section 20.2 A 'When Opinions Must Be in Writing,'" and "section 20.3B 'Statement of the Court's Reasons,'" which is attached at Appendix D-1 and D-2 to this brief. Simple logic would seem to require that, under that constitutional provision, the California Supreme Court, in its review of People v. Souter was required to set forth in writing why Souter was depublished, and whether such depublication was due to the fact that it was regarded as an application of an existing rule of law to a set of facts which were

the same as those stated in the published opinion in People v. Fixler, supra, or, alternatively, as a "limiting construction" of Penal Code section 266i, which had been incorrectly deprived of certification and publication. For either reason, People v. Souter would have been controlling as a determination by the California Supreme Court, and not simply as a determination by the Court of Appeal.

The ultimate status of People v. Souter, supra, under California law is not an issue for a determination at this time on this Petition for a Writ of Certiorari. What is material and relevant on this Petition is the fact that the People on the State issue were deprived of procedural due process of law by the California Rule of Court which unconstitutionally precluded their citing People v. Souter and that, because of the uncertainty caused by the Calif-

ornia Supreme Court's not having considered Souter, its analysis in People v. Freeman does not constitute an adequate state ground for the decision, as Circuit Judge O'Connor has reasoned, and this Court does have jurisdiction to consider the federal issue which was erroneously decided by the California Supreme Court.

Upon remand on the federal issue, the California Supreme Court will have to examine, upon reargument, the State's contention on the State issue that the Souter "limiting construction" in 1982 which, through no fault of the People, was not cited to the California Supreme Court, is controlling law in California; that James Souter of World Modeling Agency had knowledge of that construction; that his co-conspirator Harold Freeman also had knowledge of such construction; and that Harold Freeman was, therefore,

foreclosed from arguing the contrary in his appeal from the criminal conviction. See, in this regard, Judge Lui's ruling as to James Souter in People v. Souter, supra, at Appendix B-17 and B-18 to this brief.

(B) THE "DELIMITING CONSTRUCTION" APPLIED BY THE CALIFORNIA SUPREME COURT IN RELATION TO THE PORNOGRAPHIC ACTS PERFORMED FOR FREEMAN IN HIS PRODUCTION OF THE HARD-CORE PORNOGRAPHIC FILM, "CAUGHT FROM BEHIND 2": THAT, "IN ORDER TO CONSTITUTE PROSTITUTION, THE MONEY OR OTHER CONSIDERATION MUST BE PAID FOR THE PURPOSE OF SEXUAL AROUSAL OR GRATIFICATION," VIOLATES NATURAL LAW PRINCIPLES AND DOES NOT CONSTITUTE AN ADEQUATE STATE GROUND OF DECISION.

The governmental proscription against "prostitution" is well nigh universal and, in the light of our Judaeo-Christian heritage, is a necessary part of both the common law and the natural law upon which such common law principles are based.

In Book IV of his Commentaries, Blackstone noted that prostitution was

an indictable offense against religion and morality under the common law.

The Common Law proscription is memorialized in the Red Light Abatement Laws of the 50 states, and "traditional" Red Light Abatement opinions, such as Justice Kaufman's opinion 14 years ago in People ex rel Hicks v. "Sarong Gals" et al. 117 Cal.Rptr. 24.

The delimiting, "new" construction of "prostitution" applied in 1988 by Justice Kaufman to the pornographic acts performed for Freeman in the production of the hard-core pornographic film, "Caught From Behind 2": that, "in order to constitute prostitution, the money or other consideration must be paid for the purpose of sexual arousal or gratification," clearly offends the above-stated common law principles and California Civil Code section 5, which requires that California Statutes be construed

in the light of the Common Law and not as new enactments.

(C) THE CALIFORNIA SUPREME COURT'S ANALYSIS OF THE PANDERING PROVISION OF CALIFORNIA PENAL CODE SECTION 266i DOES NOT CONSTITUTE AN "INDEPENDENT" STATE GROUND OF DECISION.

Petitioners read the State Supreme Court's opinion differently and respectfully disagree with Circuit Justice O'Connor's assumption that Justice Kaufman's "new" construction of Penal Code 266i was routine, was not under duress, and was arrived at by the California Supreme Court, independent of its ruling on the federal issue. The choice of language in three paragraphs of the opinion, and the 16 years of hotly contested appellate case law, demonstrating an entirely different public policy, instruct otherwise.

First, the Court was strangely suspicious of the People's motives (see

Appendix A-7 to the Petition for Writ of Certiorari herein.

This suspicion may have been due to the fact that the film "Caught From Behind 2" very obviously is hard-core pornography ---the Court reasoning, "Why wasn't the film prosecuted as hard-core pornography under the obscenity statutes?" See Appendix B-8, paragraph 1, to this brief.

Secondly, the Court was more certain of its ruling on the federal issue, and less certain of the soundness of the "new" construction of the term "prostitution," which it was applying in the State case (See Appendix A-11 to the Petition for Writ of Certiorari at "B. First Amendment Considerations").

Thirdly, the language employed to delimit the meaning of the term "prostitution" was unnatural and distorted. See Point 1(B) above at page 13.

Fourth, the past 16 years of hotly contested appellate litigation, involving sexual conduct in public and related First Amendment claims, demonstrate a radical departure from a solid public policy which was 180° out of phase with the Court's new "delimiting" construction as to the term "prostitution." All of those contests were taken to the California Supreme Court for full mandatory review. Under one interpretation of appellate caselaw in California, a denial of hearing after a mandatory review by the California Supreme Court has a special meaning. See 9 Witkin, California Procedure, Third Edition, at pages 743-747, a copy of which text is attached as Appendix E-1 through E-3 to this brief.

See People ex rel Hicks v. "Sarong Gals" 27 Cal. App. 3d 46 (August 3, 1972, hearing denied Nov. 9, 1972); People v. Drolet 30 Cal. App. 3d 207 (Jan. 26, 1973); People v. Tom Parker 33 Cal. App. 3d 842 (Aug. 6,1973, hearing denied Oct. 3, 1973); People v. Howard Zeihm 40 Cal. App. 3d 1085 (Aug. 2, 1974, hearing denied Oct. 10, 1974); People

ex rel Hicks v. " Sarong Gals"42 Cal. App. 3d, 556 (Oct. 18, 1974, hearing denied Dec. 11, 1974); People v. Fixler 56 Cal. App. 3d 321 (Mar. 17, 1976, hearing denied May 14, 1976); People ex rel Van De Kamp v. American Art Enterprises, Inc. 75 Cal. App. 3d, 523 (Nov. 30, 1977, hearing denied Feb. 2, 1978); People ex rel Van De Kamp v. American Art Enterprises, Inc. 177 Cal. Rptr. 776 (Oct. 27, 1981, hearing granted Jan 13, 1982); People v. Souter 178 Cal. Rptr. 111 (Oct. 13, 1981, hearing denied Jan. 27, 1982); People ex rel Van De Kamp v. American Art Enterprises, Inc. 33 Cal. 3d 328, (Jan 31, 1983, rehearing denied Mar. 2, 1983); People v. Freeman 233 Cal. Rptr. 510 (Jan. 6, 1987, review granted Apr. 16, 1987); People v. Freeman 250 Cal. Rptr. 598 (Aug 25, 1988).

In view of the constitutional requirement of California Constitution Article VI §14 that the California Supreme Court's determinations must state the reasons (See Appendix D-1 and D-2 to this brief), the above described "hearing denied" rulings, considered collectively, strongly support Petitioners' contention that, upon remand, the independent state grounds relied upon in Freeman will be abandoned and People v. Souter must and will prevail.

(D) THE NEED FOR THIS COURT TO REVIEW THE "LEWD CONDUCT-FREE SPEECH" FEDERAL ISSUE IS EMERGENT. SUCH A REVIEW COULD NOT, UNDER ANY SET OF CIRCUMSTANCES, BE VIEWED AS AN "ADVISORY OPINION."

The petition herein at pages 32 and 49-54 describes an emergent need for this Honorable Court to resolve the federal "lewd conduct-free speech" controversy which this Court has avoided for the past 24 years. That it should occur in the background of these facts and the appellate court decision in People v. James Marvin Souter, Jr. 178 Cal.Rptr. 111 (Oct. 13, 1981, hearing denied Jan. 27, 1982) is pure poetic justice. Souter and the California community's failure to act in 1982 was,to a large degree, responsible for the seduction of Colleen Applegate in 1983-1984. See Exhibit 6 to the Brief Amicus Curiae of Phil and Karen Applegate in Fort Wayne Books, Inc. v. Indiana No. 87-470. The transcript of the PBS documentary "Death

of a Porn Queen" appears at Exhibit F-1 to F-36 to this brief. James Marvin Souter, Jr.'s participation in that seduction appears at Appendix F-7, F-8, F-11, and F-12.

The unresolved "lewd conduct- free speech" question continues to function as a "pimp" for Jim South's (World Modeling Agency) "pandering" operations.

If the rule of law laid down in James Phalen v. The Commonwealth of Virginia, 12 L. Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government...It is a principle of the Common Law, that the king cannot sanction a nuisance..."

is to continue to have meaning, the Petition for Writ of Certiorari herein should be granted, and the case set for briefing and oral argument.

Feb. 12, 1989.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 12th day of February, 1989, the original and 40 copies of the within PETITIONERS' SUPPLEMENTAL BRIEF were deposited in the United States Post Office in Van Nuys, California, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served, have been served:

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APPENDIX A

MEMORANDUM OPINION OF CIRCUIT JUSTICE O'CONNOR, FILED FEBRUARY 1, 1989, DENYING THE APPLICATION OF LOS ANGELES COUNTY DISTRICT ATTORNEY IRA REINER FOR A STAY OF THE ENFORCEMENT OF THE JUDGMENT ON THE GROUND THAT THE DECISION OF THE CALIFORNIA SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT GROUNDS.

(Reference: Petitioners' Supplemental Brief at page 1.)

SUPREME COURT OF THE UNITED STATES

No. A-602 (88-1054)

CALIFORNIA *v.* HAROLD FREEMAN

ON APPLICATION FOR STAY

[February 1, 1989]

JUSTICE O'CONNOR, Circuit Justice.

The State of California requests that, as Circuit Justice, I stay the enforcement of the judgment of the Supreme Court of California pursuant to 28 U. S. C. § 2101(f) pending the disposition of a petition for certiorari (No. 88-1054) to review that judgment. Because I think it unlikely that four Justices would vote to grant certiorari, see *Hicks* v. *Feiock*, 479 U. S. 1305, 1306 (1986) (in chambers opinion), I deny the application for issuance of a stay.

In its petition for certiorari, California seeks review of the State Supreme Court's judgment reversing the conviction of respondent Freeman for pandering under California Penal Code § 266i. *People* v. *Freeman*, 46 Cal. 3d 419, 758 P. 2d 1128 (1988). Freeman is a producer and director of pornographic films who hired and paid adults to perform sexual acts before his film cameras. In 1983, Freeman was arrested and charged with five counts of pandering based on the hiring of five such performers. He was not charged with violation of any of California's obscenity laws. Freeman was tried before a jury and convicted on all five counts of pandering; the State Court of Appeal affirmed the judgment of conviction. *People* v. *Freeman*, 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1988).

On discretionary review, the California Supreme Court first considered the relevant statutory language of the State Penal Code. In relevant part, § 266i of the Penal Code provides that a person is guilty of felonious pandering if that per-

son "procures another person for the purpose of prostitution . . . ." Prostitution, in turn, is defined in § 647(b) of the Penal Code as "any lewd act between persons for money or other consideration." Finally, "'for a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*'" 46 Cal. 3d, at 424, 758 P. 2d, at 1130 (emphasis in original), quoting *People* v. *Hill*, 103 Cal. App. 3d 525, 534–535, 163 Cal. Rptr. 99, 105 (1980).

Interpreting these definitions of terms relevant to the state pandering statute, the State Supreme Court held that "in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*" 46 Cal. 3d, at 424, 758 P. 2d, at 1131 (emphasis in original). Applying this principle to Freeman, the court characterized the payments made to the performers as "acting fees" and held that "there is no evidence that [Freeman] paid the acting fees for the purposes of sexual arousal or gratification, his own or the actors'." *Id.*, at 424–425, 758 P. 2d, at 1131. Thus, the court held, "[Freeman] did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution." *Ibid.* In the succeeding section of its opinion, the California Supreme Court went on to observe that "even if [Freeman's] conduct could somehow be found to come within the definition of 'prostitution' literally, the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values." *Ibid.*

California, in its petition for certiorari, would have us review this First Amendment holding of the State Supreme Court. I recognize that the State has a strong interest in controlling prostitution within its jurisdiction and, at some

point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed. I do not, however, think it likely that four Justices would vote to grant the petition because in my view this Court lacks jurisdiction to hear the petition. It appears "clear from the face of the [California Supreme Court's] opinion," *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), that its analysis of the pandering provision of the State Penal Code constitutes an adequate and independent state ground of decision. Interpretations of state law by a State's highest court are, of course, binding upon this Court. *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). Here, the California Supreme Court has decided that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under §266i of the California Penal Code. That is an adequate ground for reversing Freeman's conviction.

As I read the State Supreme Court's opinion, it is independent of federal law as well. This Court has held that, where a state court has "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . . we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide . . . 'suits according to its own local law.'" *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977), quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950). This does not appear to be such a case.

The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled "First Amendment Considerations." The state court's discussion of the language of the Penal Code, which concludes with the clear holding quoted above, is not "interwoven with the federal law."

Michigan v. *Long*, *supra*, at 1040. Discussion of federal law—specifically the First Amendment—is strictly confined to the second subsection and constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid. *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

There is language early in the California Supreme Court's discussion section observing that "the prosecution of [Freeman] under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort." 46 Cal. 3d, at 423, 758 P. 2d, at 1130. Nevertheless, in light of the subsequent clear holding based exclusively on the state pandering statute, as well as the State Supreme Court's doubts in its discussion of the First Amendment whether "[Freeman's] conduct could *somehow* be found to come within the definition of 'prostitution' literally." *id.*, at 425, 758 P. 2d, at 1131 (emphasis added), I conclude that the state court's statutory holding is independent from its discussion of the First Amendment and was not driven by that discussion. Because the decision of the California Supreme Court rests on an adequate and independent state ground, the State of California's application for a stay of enforcement of the judgment of the California Supreme Court is denied.

So ordered.

APPENDIX B

COPY OF "DEPUBLISHED" OPINION OF THE COURT OF APPEAL, SECOND DISTRICT, DIVISION 3, IN PEOPLE V. JAMES MARVIN SOUTER ET AL, 178 CAL. RPTR. 111, DECIDED OCTOBER 13, 1981, HEARING DENIED BY THE CALIFORNIA SUPREME COURT ON JANUARY 27, 1982, WHICH ORDERED THAT THE OPINION BE NOT OFFICIALLY PUBLISHED.

(Reference: Petitioners' Supplemental Brief at pages 2, 4, 6, 7, 13, 16, and 18.)

The PEOPLE, Plaintiff and Appellant,

v.

James Marvin SOUTER, Jr., Mike Stephen Henderson, and Royce Shepard, Defendants and Respondents.

Cr. 39149.

Court of Appeal, Second District, Division 3.

Oct. 13, 1981.

Rehearing Denied Nov. 9, 1981.

Hearing Denied Jan. 27, 1982.*

LUI, Associate Justice.

Statement of the Case

A preliminary hearing was conducted in the Municipal Court of the Los Angeles Judicial District subsequent to the filing of a felony complaint. At the conclusion of the preliminary hearing, each of the respondents was held to answer. An information was filed in the Los Angeles Superior Court charging each of the respondents with con-

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* In denying hearing, the Supreme Court ordered that the opinion be not officially published.

spiracy (Pen.Code, § 182.2) [1] to commit pandering, a felony, in violation of section 266i (count I) and with violations of section 266i (counts II to V).[2]

Following arraignment and other proceedings in the superior court, the respondents' motion to set aside the information pursuant to section 995 was heard and submitted subject to additional testimony. On October 17, 1980, the superior court granted the respondents' motion to dismiss the information. The People appeal the granting of the motion to dismiss.[3]

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1. Hereinafter all references are to the Penal Code unless otherwise indicated.

2. Count II charged respondent Royce Shepard ("Shepard") with procurement of Jolande Van Amersfoorth to become a prostitute; count III charged James Marvin Souter, Jr. ("Souter") and Shepard with procurement of Marilyn Petersen to become a prostitute, and counts IV and V charged all respondents with the procurement of Michelle Leroy to become a prostitute. The counts in the information alleged that the violations occurred in the months of February, May, June, and July 1979.

3. Section 1238, subdivision (a)(1), authorizes the People to appeal from an order setting aside an information.

Facts

We shall summarize the evidence presented at the preliminary hearing.[4] Respondent Souter (sometimes known as "South"), was connected with a business known as the World Modeling Agency ("World"). Barbara Sobel, Marilyn Petersen, Jolande Van Amersfoorth and Michelle Leroy each went to World seeking employment. At some stage in their contact with World, Souter offered them work in movies and referred them to either respondents Henderson and/or Shepard (sometimes known as "Sinclair").

Sobel contacted Henderson and Shepard and then made two movies. In the first film, Sobel performed oral copulation and sexual intercourse with a Caucasian actor portraying a dance instructor and was paid $100. Henderson was the cameraman and director of the film. A second film involving sex acts was made by Sobel in Palm Springs and directed by Shepard, Hender-

4. There is no material dispute as to the facts presented by the testimony of various witnesses at the preliminary hearing and discussed in the respective briefs filed by counsel.

son and Tom Cobb. Sobel was paid $300 by check and then flown back to Los Angeles by Henderson. Upon her return to Los Angeles, Sobel contacted Souter, told him how much she was paid and said that she was upset about having had to perform sex with a black person.

Marilyn Peterson worked for World as a model for a couple of weekends over several months. Souter then suggested that she do a movie in which she would perform sex acts, including oral sex. Souter referred Petersen to Shepard, who drove her to Palm Springs in May 1979. There she made a movie directed by Tom McQuade in which she performed sexual intercourse and oral sex for which she was paid $325. In June 1979, Souter contacted Peterson about making a commercial which actually turned out to be another film in which Petersen engaged in sex and for which she was paid $900.

In January 1978, Jolande Van Amersfoorth was introduced to Shepard by Souter at World's offices. Subsequently, she was paid $200 to make a movie which involved sex acts, including oral sex. She made a

second movie, also involving sex, for Shepard about a year later for which she was paid $200 or $250.

Michelle Leroy went to World in April 1979, where she met Souter. After agreeing to make a movie, she was given Shepard's phone number. She met Shepard, and discussed making a movie and the fee involved. She later made the movie involving sex acts and was paid by the cameraman. None of the respondents was present at the making of the first movie. Leroy made a second movie one or two months later which was arranged after discussions with Souter and Shepard. In the second movie, Leroy performed sexual intercourse and oral copulation. She was paid $300 by Henderson after she performed.

Some general statements can be made about the testimony concerning the films. The women engaged in sex acts with male actors who were also paid. They stated they were not prostitutes and that they performed the sex acts in the movies as actresses for money rather than for personal sexual gratification. In fact, the witness Petersen indicated that the male actors in

the films she made had difficulty maintaining sexual arousal or an erection. Prior to making the films, a story line and script were discussed. A director was present and artificial lighting was utilized. On several occasions, the women were provided wardrobes from which they selected clothing to be used in the films. Still photographs were occasionally taken during the filming. The filming took longer than normal sexual activity due to the shooting of the film and changing of cameras. In some instances, a filming session consumed up to five or six hours.

Tom McQuade, a professional cameraman, worked for and was paid by Shepard from 1978 until the preliminary hearing. During this period, he made approximately 30 films, all involving sex. He filmed movies involving Sobel, Van Amersfoorth, Petersen and Leroy. The sex acts depicted in the movies he filmed actually occurred and were not simulated. McQuade considered his employment as that of a professional film maker. He received his bachelor's degree in radio and television filming from the University of Maryland in 1975, worked

as an editor for commercial production houses and now freelances. McQuade stated that he made the films with high quality equipment and with the goal of achieving the highest quality given budgetary limitations.

Issue Presented

The issue presented in this appeal is whether persons who pay others to perform sexual activities in motion pictures can be prosecuted for pandering under section 266i.[5]

Discussion

The superior court based its order setting aside the information primarily on its interpretation that our Supreme Court's decision in *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483, is controlling in the instant case because the

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5. Section 266i provides in pertinent part as follows: "Any person who: (a) procures another person for the purpose of prostitution; . . . is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for two, three, or four years."

First Amendment prohibits the use of the pandering statute where sexual activity is filmed for inclusion in a motion picture.[6] The lower court was of the opinion that the obscenity statutes and not the pandering statute should be utilized by the prosecution.

In *Barrows, supra*, the plaintiffs actor, actress, producer and director of the live theatrical play entitled "The Beard," were charged with disorderly conduct in violation of section 647, subdivision (a), and with speaking obscene words in a public place in

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6. In making its ruling, the lower court expressed concern with the use of the pandering statute, which if made applicable herein, would subject to prosecution eminent producers, directors and world renowned artists portraying roles in classic works in motion pictures involving acts of sexual intercourse for compensation. The court below was also concerned with the applicability of the pandering statute to producers of a film which involved legitimate medical research on human sexuality if persons were compensated for performing acts of sexual intercourse to be depicted in the film.

violation of section 311.6[7] for their participation in a live theatrical performance. The asserted lewd act was a simulation of an act of oral copulation.

Our Supreme Court's decision in *Barrows* is directed at a statutory interpretation of sections 647, subdivision (a), and 311.6. *Barrows* indicates that these two sections are not applicable to live theatrical performances. The trial court's reliance on *Barrows* to allow respondents immunity from prosecution under the pandering statute is misplaced..

In *Barrows*, our Supreme Court stated, 1 Cal.3d at pages 830–831, 83 Cal.Rptr. 819, 464 P.2d 483: "Our holding here does not

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7. Section 647, subdivision (a), provides, "[e]very person who . . . solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view" shall be guilty of disorderly conduct, a misdemeanor.

Section 311.6 then provided: "Every person who knowingly sings or speaks any obscene song, ballad, or other words, in any public place is guilty of a misdemeanor."

suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course of a theatrical play. *Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero.....* [*In re Giannini* (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535] makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.2d at p. 572, 72 Cal.Rptr. 655, 446 P.2d 535.) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theater and cinema. The loss to culture and to First Amendment rights would be equally tragic." (Emphasis added.)

Barrows protects the right of the theater to portray conduct by simulated activity if the portrayal is not obscene. *Barrows* does not offer the cloak of First

Amendment protection to actual activity which violates the law. *Barrows* does not protect the producer of a theatrical play or motion picture who employs an artist to commit a crime to intensify the drama depicted therein. The solicitation of an artist to commit an actual violation of our penal statutes is not protected by virtue of its depiction in a play or movie. Thus, the procurement of a person to commit an act of sexual intercourse or oral copulation for compensation is a violation of the pandering statute even if depicted in a play or movie.

Respondents' reliance on the First Amendment of the United States Constitution and the California Constitution article I, section 2, is misplaced. The prosecution here is focused on the conduct in making the film and not on prohibiting the communication of ideas, impressions or feelings. Here, we are not faced with questions related to the dissemination or exhibition of the films which would require scrutiny under the First Amendment. Instead, our attention is directed to the manner in which the material incorporated in the film was originally obtained. (See *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363.)

Respondents next argue that the activities engaged in by the models did not constitute acts of prostitution under our Supreme Court's recent decision of *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636. We are not persuaded by respondents' arguments that *Pryor* is applicable in the instant case. Section 647, subdivision (b), provides that: "Every person ... [w]ho solicits or who engages in any act of prostitution" is guilty of disorderly conduct, a misdemeanor. As used in this subdivision, " 'prostitution' *includes* any lewd act between persons for money or other consideration." (Emphasis added.) In *Pryor*, our Supreme Court prescribed a new construction of section 647, subdivision (a),[8] "to establish a specific, constitutionally definite test of what conduct does or does not violate [section 647, subdivision (a)]." (*Pryor, supra*, 25 Cal.3d at p. 258, 158 Cal.Rptr. 330, 599 P.2d 636.)

That new construction was as to the term

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8. *Ibid.*, footnote 7.

"lewd and dissolute"[9] conduct and not to the term "prostitution." Section 647, subdivision (b), prohibits prostitution which *includes* any "lewd act" for money or other consideration. In our view, an act of sexual intercourse or oral copulation for compensation is prostitution. Other acts which do not involve sexual intercourse or oral copulation *may* require reference to the *Pryor* definition of "lewd and dissolute" conduct to determine whether such acts constitute acts of prostitution. But, such is not the

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9. The *Pryor* court stated the following construction of section 647, subdivision (a): "The terms 'lewd' and 'dissolute' in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view." (*Pryor, supra*, 25 Cal.3d at pp. 256–257, 158 Cal.Rptr. 330, 599 P.2d 636.)

case here.

Respondents also rely on *People v. Hill* (1980) 103 Cal.App.3d 525, 163 Cal.Rptr. 99. *Hill* involved the prosecution of a defendant for pimping and pandering. The defendant procured a 17-year old male, Eugene, for an undercover police officer. The officer testified that Hill offered Eugene for sex acts and that Eugene agreed to perform acts of oral copulation and sodomy for $300. Hill and Eugene both testified that Eugene's services would be solely for a nude photo session for which the officer was to pay $40. Therefore, a factual dispute was present in *Hill* as to what services were offered by the defendant, viz, nude modeling or oral copulation and sodomy. Consequently, the *Hill* court reversed the conviction on the failure of the trial court to instruct the jury, *sua sponte*, on the defendant's asserted defense that Eugene's services were offered solely for nude modeling for photographs. The *Hill* court's concern was directed at that part of section 647, subdivision (b), which states that prostitution includes any "lewd act." The *Hill* court declined to choose the definition of prostitution proposed by earli-

er Court of Appeal decisions in *Fixler, supra, People v. Grow* (1978) 84 Cal.App.3d 310, 148 Cal.Rptr. 648, and *People v. Schultz* (1965) 238 Cal.App.2d 804, 48 Cal.Rptr. 328, but relied on the *Pryor* test of "lewd or dissolute conduct" because a factual dispute was present as to whether any *touching* of Eugene was to occur by virtue of the negotiations between Hill, Eugene and the undercover officer. The court in *Hill* stated: "As we have pointed out herein, nude modeling for photographic purposes, which involves no bodily contact between model and photographer, does not fall within the concept of prostitution. Such conduct by the model cannot be deemed a 'lewd' act between persons for money in light of the views of the California Supreme Court set forth in the *Pryor* case." (*Hill, supra*, 103 Cal.App.3d 525, 536, 163 Cal.Rptr. 99.)

In the instant case, there is no such factual dispute as was present in *Hill*. The testimony at the preliminary hearing was unrebutted as to the type of activity involved in these films—sexual intercourse and oral copulation. Consequently, we need not refer to that part of section 647, subdi-

vision (b), which states that "prostitution *includes* any lewd act between persons for money or other consideration."

Section 266i contains no definition of prostitution. Section 647, subdivision (b), states "[a]s used in *this subdivision*, 'prostitution' includes any lewd act between persons for money or other consideration." (Emphasis added.) The language of section 647, subdivision (b), is expressly limited to that subdivision by its own terms and should not be read into section 266i in the absence of a specific reference.

In our view, the term "prostitution" as used in section 266i means performing acts of sexual intercourse for compensation. It is not our intent to set forth a definition of prostitution and to state all the possible variations of activity which could be encompassed within the term. We approve the definition set forth in Black's Law Dictionary (5th ed. 1979), which states at page 1100, "prostitution is performing an act of sexual intercourse for hire, or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire." This is a clear and concise definition of the

term prostitution which is not subject to question and which would include within its meaning both acts of sexual intercourse and oral copulation as is present in the instant case.

Thus, section 266i is violated if a person procures another person to commit an act of sexual intercourse or oral copulation for compensation.

Respondents also assert that the use of the pandering statute in the instant case is unfair and violates notions of due process because respondents could not reasonably have been on notice that the statute would be utilized in the prosecution of their activity. This argument is untenable. *Fixler, supra*, and *People ex rel Van de Kamp v. American Art Enterprises, Inc.* (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, unequivocally held that sexual intercourse for hire by models whose activity is photographed for publications is prostitution. *Fixler* approved the use of section 266i to prosecute a photo editor and a photographer who had been hired to perform sexual activity for compensation while being photographed. There is no essential difference

between the shooting of photographs for publications and filming for production of movies. The procurement of models to perform the acts in question falls squarely within the ambit of section 266i. As stated in *People v. Lax* (1971) 20 Cal.App.3d 481, 487, 97 Cal.Rptr. 722: " 'The Statute [section 266i] endeavors "to cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned." [Citing *People v. Montgomery* (1941) 47 Cal.App.2d 1, 24, 117 P.2d 437 and *People v. Charles* (1963) 218 Cal.App.2d 812, 816, 32 Cal.Rptr. 653.]' "

We interpret section 266i to effect the intent and objective of the Legislature, which must be to prohibit the procurement of persons to perform sexual activity in exchange for money. As stated in section 4, "[t]he rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

Finally, respondent Henderson contends that the trial court below improperly denied his motion to dismiss for lack of sufficient evidence. According to the rule governing appellate review, we must view the evidence in the light most favorable to upholding the magistrate's decision and if there is any competent evidence in the transcript which would justify the magistrate's entertaining a reasonable belief that defendants had committed a felony, a motion to set aside should have been denied. (*People v. Haybron* (1980) 108 Cal.App.3d 31, 35, 166 Cal.Rptr. 264.) We have reviewed the transcript of the preliminary hearing. In our view, the evidence is sufficient to sustain the magistrate's decision holding the respondent Henderson to answer.

The order granting the motion to dismiss the information as to each respondent is reversed.

KLEIN, P. J., and POTTER, J., concur.

APPENDIX C

COPY OF CALIFORNIA RULES OF COURT FOR PUBLICATION OF APPELLATE OPINIONS (RULES 976, 976.1, 977, and 978).

(Reference: Petitioners' Supplemental Brief at page 7.)

DIVISION III

Rules for Publication of Appellate Opinions

[Title 3, Miscellaneous Rules—Division III, Rules for Publication of Appellate Opinions; Division adopted by the Supreme Court effective January 1, 1964.]

Rule
976. Publication of appellate opinions
(a) [Supreme Court]
(b) [Standards for publication of opinions of other courts]
(c) [Publication procedure]
(d) [Superseded opinions]
(e) [Editing]
976.1. Partial publication experiment
(a) [Partial publication authorized]
(b) [Other copies available]
(c) [Copy to Reporter of Decisions]
(d) [Repealed]
977. Citation of unpublished opinions prohibited; opinions ordered published by Supreme Court
(a) [Unpublished opinions]
(b) [Exceptions]
(c) [Citation procedure]
(d) [Opinions ordered published by Supreme Court]
978. Requesting publication of unpublished opinions
(a) [Request procedure; action by court rendering opinion]
(b) [Action by Supreme Court]
(c) [Effect of Supreme Court order for publication]

Cross References:
Appellate rules: Rules 1 et seq.

Collateral References:
Witkin Procedure (3d ed) Appeal §§ 578 et seq.; Courts § 151.
Cal Jur 3d (Rev) Courts § 209.
Cal Digest of Official Reports 3d Series, Courts § 31.

Rule 976. Publication of appellate opinions

(a) [Supreme Court] All opinions of the Supreme Court shall be

published in the Official Reports. (Subd (a) adopted effective January 1, 1964.)

(b) [Standards for publication of opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law. (Subd (b) as amended effective January 1, 1983; previously amended effective November 11, 1966, and January 1, 1972; adopted effective January 1, 1964.)

(c) [Publication procedure]

(1) [Courts of Appeal and appellate departments] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [Supreme Court] An opinion certified for publication shall not be published, and an opinion not so certified shall be published on an order of the Supreme Court to that effect. (Subd (c) as amended effective January 1, 1983; previously amended effective November 11, 1966, and January 1, 1972; adopted effective January 1, 1964.)

(d) [Superseded opinions] Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part. (Subd (d) as amended effective May 6, 1985; previously amended effective January 1, 1983; Subd (e) renumbered subd (d) effective January 1, 1972; adopted effective January 1, 1964.)

(e) [Editing] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court, and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for

publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval. (Subd (f) renumbered subd (e) effective January 1, 1972; previously amended effective November 11, 1966; adopted effective January 1, 1964.)

Rule 976 as amended effective May 6, 1985; previously amended effective November 11, 1966, January 1, 1972, January 1, 1983; adopted by the Supreme Court effective January 1, 1964.

Cross References:

Clerk of appellate court to transmit two copies of final judgment to Reporter of Decisions in accordance with this rule where opinion to be published: Rule 106.
Partial publication: Rule 976.1.
Unpublished opinions: Rules 977 et seq.
Requesting publication: Rule 978.
Publication and official advertising: Gov C §§ 6000 et seq.
Reporter of Decisions generally: Gov C §§ 68900–68905.

Collateral References:

Cal Jur 3d Appellate Review § 559.
Witkin Procedure (3d ed) Courts §§ 151, 256, 260, 301; Appeal §§ 33, 578 et seq., 695, 724, 770.
Cal Family Law Service §§ 35:108, 35:115.
Cal Practice Rev Ch 31 Default Judgments.
Calif Trial Handbook 2d (BW, 1987) 28:50.
Am Jur 2d Appeal and Error § 901.

Law Review Articles:

Internal workings and current concerns of the California Supreme Court. (1974) 62 CLR 309.
Censoring the law in California: Decertification revisited. (1979) 30 Hast LJ 1577.
Selective publication of case law. 39 SCLR 608.
Some reflections on the control of the publication of appellate court opinions. (1975) 27 Stan LR 791.

NOTES OF DECISIONS

The "all or nothing" character of the California Rules of Court governing publication of appellate opinions, required publication of the entire opinion, where one issue met publication criteria, although the remaining issues did not. People v Mask (1977) 66 CA3d 839, 136 Cal Rptr 283.

Rule 976.1. Partial publication experiment

(a) [Partial publication authorized] A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

(b) [Other rules applicable] For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion.

(c) [Copy to Reporter of Decisions] One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

(d) [Repealed effective January 1, 1984.]

Rule 976.1 as amended effective January 1, 1984; adopted effective January 1, 1983.

Collateral References:
Witkin Procedure (3d ed) Appeal §§ 586, 588, 589.

Law Review Articles:
Appellate court reform; desirability of minimizing written opinions. 4 Pacific LJ 22.

Rule 977. Citation of unpublished opinions prohibited; opinions ordered published by Supreme Court

(a) [Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b). (Subd (a) as amended effective January 1, 1983; adopted effective January 1, 1974.)

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding. (Subd (b) as amended effective January 1, 1983; adopted effective January 1, 1974.)

(c) [Citation procedure] A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation. (Subd (c) as amended effective January 1, 1983; adopted effective January 1, 1974.)

(d) [Opinions ordered published by Supreme Court] An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable. (Subd (d) adopted effective May 6, 1985.)

Rule 977 as amended effective May 6, 1985; previously amended effective January 1, 1974, and January 1, 1983; adopted by the Supreme Court and by the Judicial Council effective January 1, 1974.

Editor's Note—Subdivision (d) as adopted by the Supreme Court included the following as a footnote: "Any citation to the Court of Appeal opinion shall include reference to the grant of review and any subsequent action by the Supreme Court."

Collateral References:
Witkin Procedure (3d ed) Courts § 256; Appeal §§ 583 et seq., 695, 717, 724.

Forms:
Calif Criminal Forms & Instructions (BW, 1983) § 1:9.

Law Review Articles:

Use of unreported cases in California. 24 Hast LJ 37.

Some reflections on the control of the publication of appellate court opinions. (1975) 27 Stan LR 791.

The unpublished appellate opinion. 48 St BJ 387.

NOTES OF DECISIONS

Cal. Rules of Court, rule 977, providing that a nonpublished opinion of the Court of Appeal or of an appellate department of the Superior Court shall not be cited by a court or by a party in any other action or proceeding, does not prohibit appellate consideration of the opinion on its merits where the unpublished decision was cited to the trial court and where it was considered by the parties and the trial court and made a part of the record on appeal for the purpose of apprising the reviewing court of the trial court's reasons for its decision. Gray v Kay (1975) 47 CA3d 562, 120 Cal Rptr 915.

An appeal by a county employees retirement board from a judgment of the trial court holding that it had abused its discretion in rejecting a hearing officer's finding that an employee was entitled to service connected disability could not be said to be frivolous so as to subject the board to penalties, where the appeal, on its face, raised substantial issues requiring more than a cursory inspection. The fact that the board had raised the same issue on a prior appeal that resulted in an unpublished opinion could not be considered since Cal. Rules of Court, rule 977, by explicitly disallowing citation to unpublished opinions, establishes that they are not to be considered of precedential value. Hanson v Marin County Employees Retirement Board (1976) 63 CA3d 421, 133 Cal Rptr 809.

When an appellate court has given a direction in a particular cause, that direction establishes the law of the case and is binding on the trial court when it takes further proceedings in the same cause; however, this rule does not apply to unpublished opinions, which, in general, should not be cited by a court or by a party in any other action or proceeding (Cal. Rules of Court, rule 977). Thus, a justice court did not act in excess of jurisdiction by refusing, in a drunk driving case, to follow two cited decisions of the appellate department of the superior court determining that a docket entry does not meet the requirements applicable to the taking of a plea of guilty to a misdemeanor. Nelson v Justice Court (1978) 86 CA3d 64, 150 Cal Rptr 39.

Unpublished cases of the California Court of Appeal are not to be cited or considered of precedential value. Palm v Rangg (1981) 114 CA3d 967, 171 Cal Rptr 149.

Rule 978. Requesting publication of unpublished opinions

(a) [Request procedure; action by court rendering opinion] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceedion not joining therein, stating concisely why the opinion meets one or more of the publication standards. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication. (Subd (a) as amended effective January 1, 1983; adopted effective July 1, 1975.)

(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The

court shall send notice of its action to the transmitting court, each party, and any person who has requested publication. (Subd (b) as amended effective January 1, 1983; adopted effective July 1, 1975.)

(c) [Effect of Supreme Court order for publication] An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion. (Adopted effective July 1, 1975.)

Rule 978 as amended effective January 1, 1983; adopted by the Supreme Court and by the Judicial Council effective July 1, 1975.

Cross References:

Citation of unpublished opinions: Rule 977.
Publication and official advertising: Gov C §§ 6000 et seq.
Publication of appellate opinions: Gov C §§ 68902–68905.

Collateral References:

Witkin Procedure (3d ed) Courts § 256; Appeal §§ 581, 586.

APPENDIX D

COPY OF PAGES 521-532 OF "CALIFORNIA CIVIL APPELLATE PRACTICE, SECOND EDITION (CONTINUING ST. BAR, 1985)", CONTAINING AN ANALYSIS OF CALIFORNIA SUPREME COURT'S PUBLICATION OF APPELLATE OPINIONS, AND A CRITICISM OF ITS PRACTICE OF DEPUBLISHING OPINIONS AFTER DENYING A PETITION FOR A HEARING OF AN APPEAL.)

(Reference: Petitioners' Supplemental Brief at pages 9, 10, and 18.)

II. WRITTEN OPINIONS

§20.2 A. When Opinions Must Be in Writing

Decisions of the California Supreme Court and courts of appeal that determine "causes" must be in writing with the court's reasons stated. Cal Const art VI, §14. Opinions of the superior court appellate departments, which are not mentioned in Cal Const art VI, §14, may be written whenever their authors deem it advisable or in the public interest (Cal Rules of Ct 106).

The term "causes" has been interpreted to mean decisions on the merits. 6 Witkin, California Procedure, *Appeal* §493 (2d ed 1971). As a practical matter, "cause" has generally been defined by what is *not* a cause. The most common appellate decisions deemed to be not on the merits, and thus not requiring a written opinion, are:

(1) An appellate court's action denying without opinion a petition for writ of mandate or prohibition. *People v Medina* (1972) 6 C3d 484, 490, 99 CR 630, 633; *Funeral Directors Ass'n v Board of Funeral Directors & Embalmers* (1943) 22 C2d 104, 106, 136 P2d 785, 786; 6 Witkin, Procedure, *Appeal* §493. When the appellate court does issue an alternative writ or order to show cause, however, the matter becomes a "cause," and it must be decided in writing with reasons stated. *People v Medina, supra.* The same rule applies to petitions for habeas corpus. See *In re Mazoros* (1977) 76 CA3d 50, 52, 142 CR 609, 610;

(2) An order dismissing an appeal or an original proceeding, as well as decisions on other motions (see chap 10 for discussion of motions). 6 Witkin, Procedure, *Appeal* §493. See *People v Brown* (1957) 149 CA2d 175, 176, 307 P2d 949;

(3) A supreme court order denying review or rehearing. *Metropolitan Water Dist. v Adams* (1942) 19 C2d 463, 468, 122 P2d 257, 259; 6 Witkin, Procedure, *Appeal* §493.

§20.3 B. Statement of the Court's Reasons

Courts are required to state reasons to support their written decisions. Cal Const art VI, §14. It can be argued that courts fail to support their written decisions when they do not address all the legal issues raised by an appellant. For example, an opinion may treat three of four substantial legal issues raised by an appellant, and either ignore the fourth or simply declare it to be without merit—or the court may

give reasons for its resolution of only some of the legal arguments pertaining to an issue. An example of a court of appeal opinion that the California Supreme Court found in violation of Cal Const art VI, §14 is *People v Pruitt* (Ct App, Nov. 12, 1981, 3 Crim 11036), court of appeal order filed May 28, 1981, in which the supreme court granted a petition for hearing and retransferred the case to the court of appeal "with directions to render a decision with reasons stated in conformity with article VI, section 14 of the California Constitution." The court of appeal opinion had merely stated that the court had "carefully considered the record and [found] that it belies [appellant's] contention."

The courts, however, have generally refused to infer a requirement that all issues raised by appellant be addressed in the opinion. One appellate court has defined "determine causes" (Cal Const art VI, §14) to mean "disposing of the judgment or the order of the trial court and not [of] every corollary legal issue that may somehow be involved." *People v Rojas* (1981) 118 CA3d 288, 289, 174 CR 91, 92. (On rehearing, the court declined to discuss issues omitted from the earlier decision and instead used the rehearing as a vehicle to define "determine causes.")

Many opinions have discussed fewer than all the issues and have summarily dismissed the others. See, *e.g., Linhart v Nelson* (1976) 18 C3d 641, 645, 134 CR 813, 815 (judgment affirmed; "[h]aving examined defendants' other contentions, we find them of insufficient merit to warrant discussion"); *Forde v County of Los Angeles* (1976) 64 CA3d 477, 479 n1, 134 CR 549, 551 n1 (judgment affirmed; appellant's other issues "more than adequately refuted in defendants' brief and do not justify detailed discussion"). Further, if the appellate court reverses a decision, it need discuss only the issue on which it based its reversal. *Holmes v Rogers* (1859) 13 C 191, 202; *People v Rojas, supra;* 6 Witkin, California Procedure, *Appeal* §496 (2d ed 1971).

Although the guidelines are unclear, a minimal level of adequacy seems necessary to satisfy the spirit as well as the letter of Cal Const art VI, §14. It can be argued that an appellant's rights under the due process clauses of the state (Cal Const art I, §§12, 15) and federal (US Const amends V, XIV) constitutions are also violated when an appellate court arbitrarily ignores a legal issue that a litigant seeks to have reviewed as a matter of right, and that, if resolved in his or her favor, would entitle that party to some relief. When opinions fall below the minimal level, appellants may wish to request relief when

petitioning for rehearing to the court of appeal and, if appropriate, review by the California Supreme Court.

III. PUBLICATION OF OPINIONS

§20.4 A. Selective Publication

Between 1909 and 1963, publication of all supreme court and court of appeal opinions was required by statute. See Strauss, *Written Opinions*, 39 Cal SBJ 127 (1964) (reviewing California law on the publication of appellate opinions between 1849 and 1964); 6 Witkin, California Procedure, *Appeal* §506 (2d ed 1971). However, as a result of proposals for selective publication advanced by various commentators and supported by the State Bar, the legislature amended Govt C §68895 (now Govt C §68902) in 1963 to provide that publication of appellate court opinions is to be governed by rules of the supreme court. See Note, *Selective Publication of Case Law*, 39 S Cal L Rev 608 (1966); Strauss, 39 Cal SBJ 127. Under this authority, and that of Cal Const art VI, §16 (now §14), the supreme court adopted Cal Rules of Ct 976, which provides that all supreme court opinions are to be published but that publication of court of appeal or superior court appellate department decisions is to be limited to those that meet certain criteria (discussed in §20.6). In addition, Cal Rules of Ct 976.1 provides for partial publication of opinions. See §20.7.

§20.5 B. Publication of California Supreme Court Opinions

Under Cal Rules of Ct 976(a) all supreme court opinions "shall be published in the Official Reports." Although supreme court orders are not published in the bound volumes of the Official Reports, they are published as minutes at the back of the green pages of each unbound advance sheet of the Official Reports.

In some cases the supreme court concludes, after independent consideration, that the appellate court opinion correctly states the law. If it does, it may adopt and republish, sometimes with modifications, the prior opinion. See, *e.g.*, *Doers v Golden Gate Bridge Highway & Transp. Dist.* (1979) 23 C3d 180, 151 CR 837; *Estate of McDill* (1975) 14 C3d 831, 834, 122 CR 754, 755 (describing in a footnote the court's method for designating its modifications of the lower court's opinion). In rare instances, the court has simply adopted by reference those portions of the appellate court's opinion that "present no new

and important issue of law and were correctly resolved by the Court of Appeal" (*People v Ford* (1981) 30 C3d 209, 215, 178 CR 196, 199), or has written its own opinion on one or more issues and incorporated by reference the lower court's opinion on the remaining issues.

Under the version of Cal Rules of Ct 976(d) in effect as this chapter goes to press, the supreme court's order granting a hearing vacates the opinion in the lower court, and it is thereafter routinely omitted from the Official Reports. See §20.12. The practice of incorporation by reference has thus created a body of California case law that is entitled to precedential effect (see 30 C3d at 216, 178 CR at 200), yet that is not published in the Official Reports despite the mandate of Cal Rules of Ct 976(a). Chief Justice Bird's dissent in *Ford* points out that incorporation by reference does not allow readers to "discern the decision and legal reasoning" of the court. 30 C3d at 219, 178 CR at 201.

The practice of incorporating a court of appeal opinion by reference should not be needed in cases decided under Cal Const art VI, §12(b), which was added (effective May 6, 1985) to allow the supreme court to review selected issues from the court of appeal decision. Moreover, if the practice does continue, it is not likely to have the undesirable effect of creating unpublished precedent, because it seems probable that Cal Rules of Ct 976(d) will be amended to permit the publication of court of appeal opinions in cases accepted for supreme court review. See §20.12.

§20.6 C. Standards for Publishing Lower Court Opinions; Decision To Publish

Before 1972, the California Rules of Court encouraged publication. Former Cal Rules of Ct 976(b) provided that an appellate opinion was to be published if it met the criteria of former Cal Rules of Ct 976(c), which stated that every court of appeal opinion was deemed to meet the standards for publication unless a majority of the court rendering the opinion ordered otherwise. See West's Cal Rules of Ct 976 (historical note); 6 Witkin, California Procedure, *Appeal* §508 (2d ed 1971).

The current rules discourage publication. Under new Cal Rules of Ct 976(b), a court may not order an opinion published unless it meets one of the following criteria: (1) establishes a new rule of law; (2) applies an existing rule to a set of facts significantly different from

those in other published opinions; (3) modifies or criticizes an existing rule; (4) resolves or creates an apparent conflict in the law; (5) involves a legal issue of continuing public interest; or (6) makes a significant contribution by reviewing the development of a common law rule, constitutional provision, statute, or other written law.

§20.7 D. Partial Publication

The majority of a reviewing court may certify only part of an opinion for publication. Cal Rules of Ct 976.1(a). This partial publication rule was first enacted as an experiment in 1983 (see former Cal Rules of Ct 976.1(a)), and was made permanent as of January 1, 1984.

Appellate courts presumably are to publish the portion of the opinion that meets the criteria for publication. See Cal Rules of Ct 976(b). See also Report of the Chief Justice's Advisory Committee for an Effective Publication Rule p 31 (1979). Rule 976.1 itself contains no specific guidelines.

When only part of an opinion is published, the published part must state that there is an unpublished portion, and must include all material that aids in applying or interpreting the published opinion. Cal Rules of Ct 976.1(a). For purposes of Cal Rules of Ct 976, 977, and 978, the unpublished part of the opinion is treated the same as opinions that are totally unpublished. Cal Rules of Ct 976.1(b) (discussed in §20.11).

§20.8 E. Procedures for Publication and Nonpublication

The court of appeal or superior court appellate department that decides a case determines initially whether the decision will be published. Cal Rules of Ct 976(c)(1). Both that court and the supreme court can reverse this initial decision and order that an opinion previously certified for publication not be published, or that an opinion previously ordered not published be certified for publication. Cal Rules of Ct 976(c)(2), 978. The terms "depublication" and "decertification" are commonly used to refer to the decision not to publish. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 n1 (1984).

Although the standard the court of appeal or superior court appellate department applies in deciding whether to publish its opinion is spelled out in Cal Rules of Ct 976–978 and in the published manual on court of appeal procedures, Internal Operating Practices and Procedures (1979), there are no written guidelines concerning the mechanics of

making that decision. One common procedure is for the author of the opinion to indicate a preference to the other members of the court; if the author desires publication and at least one of the other panel judges concurs, the decision will be published. For a discussion of this and other methods, see Kanner & Uelmen, *Random Assignment, Random Justice*, 6 LA Law 10, 13 (1984).

When the opinion is filed, it is marked either "Certified for Publication" or "Not to be Published in the Official Reports." The court must certify the opinion for publication before the decision is final as to that court or it will lose jurisdiction to order publication. Cal Rules of Ct 24, 976(c)(1).

If an opinion is designated not for publication, anyone (not just a party to the litigation) may request by letter that the opinion be published. Cal Rules of Ct 978(a). The person making the request must (1) state why the opinion meets publication standards, (2) send copies to all parties, and (3) file the letter with the court that rendered the opinion. Cal Rules of Ct 978(a). When that court either denies the request or has lost jurisdiction to act on it because the decision has become final as to that court (see Cal Rules of Ct 24, 976(c)(1)), the court must send the request and a copy of the opinion to the supreme court with its recommendation and a brief statement of reasons for its determination. Cal Rules of Ct 978(a). The court sending the request must also send a copy of its recommendation and reasons to each party and to the person who requested publication. Cal Rules of Ct 978(a). When the supreme court receives the request it must either order the opinion published or deny the request, and it must send a copy of its action to the lower court, each party, and the person who requested publication. Cal Rules of Ct 978(b).

There is no provision in Cal Rules of Ct 976–978 for requests to depublish an opinion. However, such requests have been included in petitions for rehearing or hearing, or are submitted to the court of appeal or supreme court in letter form. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 n1 (1984). Because there are no rules prescribing the procedure to follow in requesting a court to issue a depublication order, counsel presumably may follow the procedures for requesting publication described in Cal Rules of Ct 978(a).

A party who asks the supreme court for review of the court of appeal decision may request that the opinion be ordered depublished under Rule 976(c)(2) should the petition be denied. Moreover, the supreme court may order publication or depublication on its own

motion. Cal Rules of Ct 976(c)(2); Grodin, 72 Cal L Rev 514 n1. For further discussion of supreme court depublication practice, see §20.10.

§20.9 F. Considerations in Requesting Publication or Nonpublication

Counsel should consider whether it is to the client's advantage to obtain publication or nonpublication of an opinion in any given case. Although a losing party is unlikely to want the opinion published, some attorneys request publication because they believe that publication increases the chance of obtaining review by the supreme court. Statistics indicate that in 1978 almost 68 percent of the supreme court hearings were granted in cases in which the opinion was published, whereas only about 15 percent of the opinions issued by the courts of appeal that year were published. See Annual Report of the Administrative Office of the California Courts p 59 (1979); Annual Report p 64 (1980); Report of the Chief Justice's Advisory Committee for an Effective Publication Rule p 12 n14 (1979).

That two thirds of the supreme court's caseload came from the published 15 percent of appellate decisions supports the conventional wisdom that the mere fact of publication may persuade the supreme court to take a case it would have rejected if unpublished. However, this disparity may reflect the fact that both the decision to publish and the supreme court's decision granting review single out cases that present substantial legal issues. In addition, the supreme court need not review a decision to eliminate the precedential value of an opinion with which it disagrees, since it need only order it depublished. See §20.10 on the effect of the supreme court's order to depublish a case.

If the client may be affected by the decision in a similar case, or is a member of an affected group, he or she can have a considerable stake in seeing that the opinion is published or unpublished, as the case may be. This is particularly true of institutional litigants because, for example, a published opinion sharply cutting back on governmental immunity from tort liability, or imposing on certain industries a stricter duty of care in maintaining safe premises, could be highly detrimental to government agencies, corporations, or insurance companies. See §20.8 for discussion of requests by nonparties.

Clients may also be concerned about their privacy. For example, victims in rape or incest cases may want their names removed from an opinion, and other clients may not want their names or details about their finances published. Possible solutions include asking the

court to remove personal information unnecessary to the opinion or, if the information is related to fewer than all legal questions, to request partial publication to omit that part of the opinion containing personal information. See, *e.g., Board of Educ. v Jack M.* (1977) 19 C3d 691, 131 CR 700 (school board sued teacher, who had been arrested for homosexual solicitation, to establish its right to discharge him from tenured position); *People v S. P.* (1981) 115 CA3d Supp 12, 170 CR 478 (the prosecution appealed from an order from the municipal court dismissing a charge against defendant, who had been arrested for homosexual solicitation). See also Formichi, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers §§213–214 (2d ed 1977).

The prime example of the importance of publication is the so-called test case, in which the principal reason for the litigation is to obtain a ruling that will thereafter apply to a broad class of persons. A request for publication in a test case can be based on Cal Rules of Ct 976(b), which authorizes publication if an opinion establishes a new rule of law or applies an existing rule to a set of facts significantly different from those stated in previously published opinions.

Complications may arise if counsel perceives a conflict of interest concerning publication, *e.g.*, when the client's interests would be served best by nonpublication, but publication would greatly benefit a broader group that is also represented by counsel. In such cases, the wishes of the individual client should be followed.

Frequently, however, the client is not as concerned with publication as are certain interest groups that stand to gain or lose by having the decision and its reasoning published. See generally Biggs, *Censoring the Law in California: Decertification Reinstated*, 30 Hastings LJ 1577, 1580 (1979). Thus requests to publish opinions that have been certified for nonpublication (see Cal Rules of Ct 978(a)), or requests to decertify a published opinion, are occasionally made by strangers to the litigation.

§20.10 G. Effect of Supreme Court Order

A California Supreme Court order that a decision be published is not an expression of the correctness of that opinion. Cal Rules of Ct 978(c). However, the effect of the supreme court's order *not* to publish a decision is unclear.

Presumably, the supreme court issues some depublication orders because the opinions do not meet the criteria of Cal Rules of Ct

976(b). See Witkin, Manual on Appellate Court Opinions §22 (1977); Report of the Chief Justice's Advisory Committee for an Effective Publication Rule pp 24–26 (1979). However, in the great majority of cases, depublication is ordered "because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent." Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 (1984). See also Kanner, *The Unpublished Appellate Opinion: Friend or Foe?* 48 Cal SBJ 386, 443 n64 (1973); Kanner & Uelmen, *Random Assignment, Random Justice*, 6 LA Law 10 (1984). As of 1981, the supreme court was ordering the depublication of about 100 cases a year. See Gerstein, *Law by Elimination: Depublication in the California Supreme Court*, 67 Judicature 292, 294 n1 (1984).

The California Supreme Court's practice of depublishing lower court decisions of which it disapproves has come under attack from commentators since the early 1970s. Some of the reasons for criticizing this practice include: (1) there are no standards; (2) depublication decisions are frequently based on inadequate information and on no notice to the parties or other concerned persons; (3) the practice creates uncertainty in the law because the court gives no reasons for its decision; (4) the losing party is frequently left with an apparently incorrect or unreasoned judgment against him or her; (5) initial publication in the advance sheets, followed by an unnoticed depublication order in the subsequent history table, can be a trap for busy trial lawyers and judges; (6) the practice favors well-organized special interest groups at the expense of individuals who are unaware of the practice and its consequences; and (7) it results in the depublication of opinions that in fact meet the publication criteria of Cal Rules of Ct 976(b), including opinions that are sharply critical of existing rules of law. See Kanner, *The Unpublished Opinion*, 48 Cal SBJ at 391 n8; Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S Cal L Rev 1181 (1977); Witkin, Manual on Appellate Court Opinions §22; Biggs, *Censoring the Law in California: Decertification Revisited*, 30 Hastings LJ 1577 (1979); Report of the Chief Justice's Advisory Committee pp 24–27; Kanner & Uelmen, 6 LA Law 10; Gerstein, 67 Judicature 292, 294 n1.

After studying the problem, the Chief Justice's advisory committee recommended that the supreme court limit its depublication orders to those opinions that fail to meet the publication criteria of Cal Rules

of Ct 976(b). Report of the Chief Justice's Advisory Committee p 26. The supreme court, however, rejected the committee's recommendation and instead adopted Cal Rules of Ct 976(c), which permits the court to continue its practice of depublishing any court of appeal opinion without stating a reason. In 1984, Associate Justice Grodin of the California Supreme Court published an article answering some of the criticisms directed at the court's depublication practice and exploring several alternatives. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 (1984).

The advisory committee also recommended that the court, when it grants a hearing, end its practice of automatically transferring the entire cause to itself for de novo review on all issues, and of vacating the court of appeal opinion and treating it as though it never existed. For discussion, see Report of the Chief Justice's Advisory Committee p 26. See also Comment, *The California Supreme Court and Selective Review*, 72 Cal L Rev 720 (1984). This recommendation was effectively carried into law by the adoption of Proposition 32 in November, 1984, amending Cal Const art VI, §12, effective May 6, 1985. For further discussion of this point, see §22.1.

IV. CITING OPINIONS AS PRECEDENT

§20.11 A. Unpublished Opinions

The court and counsel may not cite or rely on unpublished opinions unless they are relevant under the doctrines of the law of the case, res judicata, or collateral estoppel or when relevant to the same defendant or respondent in a criminal or disciplinary proceeding. Cal Rules of Ct 977(a), (b)(1)–(2).

California Rule of Court 977(a) does not specifically say that an unpublished opinion is unavailable as precedent. It says only that an unpublished opinion "shall not be *cited* by a court or party." *Gray v Kay* (1975) 47 CA3d 562, 566 n3, 120 CR 915, 918 n3. However, several cases state clearly that an unpublished opinion has no precedential value in California. See, *e.g.*, *Nelson v Justice Court* (1978) 86 CA3d 64, 66, 150 CR 39, 41; *Heaton v Marin County Employees Retirement Bd.* (1976) 63 CA3d 421, 431, 133 CR 809, 814; *Powers v Sissoev* (1974) 39 CA3d 865, 872 n8, 114 CR 868, 873 n8; *People v Gomez* (1972) 26 CA3d 928, 930, 103 CR 453, 454. The result is the same whether the opinion has been ordered not to be published by the issuing court or by the supreme court (see *Powers*), or has been vacated by the supreme court (before May 6, 1985; see §20.12)

in granting a hearing (see *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 250 n9, 142 CR 766, 772 n9; *People v Gomez, supra*). See also *People v Rogers* (1978) 21 C3d 542, 547, 146 CR 732, 735. But see *Gibson v Government Employees Ins. Co.* (1984) 162 CA3d 441, 446 n1, 208 CR 511, 514 n1 (opinion cites court of appeal opinion in case in which appeal was dismissed by stipulation of parties after grant of hearing but before supreme court opinion written).

Nonetheless, reviewing courts do occasionally discuss unpublished opinions, and the reasoning in them, on one ground or another. See, *e.g., People v Rogers, supra* (because the issue "was raised by the Court of Appeal, not by the parties"); *Bloom v Municipal Court* (1976) 16 C3d 71, 74 n2, 127 CR 317, 318 n2 (because of the importance of the issue); *People v Shuey* (1975) 13 C3d 835, 840, 120 CR 83, 87 (because of the importance of the issue to the judicial process).

Despite these exceptions to the mandate of Cal Rules of Ct 977, counsel should not rely on unpublished cases. Before relying on a case found in the advance sheets, counsel should consult the Cumulative Subsequent History Table in the back of the most recent Official Reports advance sheets to see whether the opinion has been superseded by a hearing (granted before May 6, 1985; see §20.12) or rehearing, modified, or ordered depublished. Of course, counsel is free to use the reasoning or authority in an unpublished opinion as long as the case itself is not cited to the court.

As stated in Rule 977, the ban against citation does not change the legal effect of a prior opinion for purposes of res judicata, collateral estoppel, or law of the case. See, *e.g., Vezina v Continental Cas. Co.* (1977) 66 CA3d 665, 667, 136 CR 198, 199 (when party invokes claim of collateral estoppel, trial court properly takes judicial notice of prior unpublished court of appeal opinion in the matter).

§20.12 B. Opinions in Cases in Which Rehearing, Supreme Court Review, or Other Judicial Action Ordered

Under the version of Cal Rules of Ct 976(d) in effect as this chapter goes to press, no opinion superseded by a hearing in the supreme court, a rehearing in the court of appeal, or other judicial action can be published. As a result, these opinions are treated like all other unpublished opinions and cannot be cited as precedent. See §20.11.

California Constitution art VI, §12 was amended, effective May 6, 1985, to add §12(b), which provides that the California Supreme Court "may review the decision of a court of appeal in any cause." The major effect of this amendment will be to permit the supreme court to review selected issues from the court of appeal decision rather than the entire case. See §22.1. Because not all issues decided in the court of appeal need be reviewed by the supreme court, the amendment will abrogate the rule that decisions of the court of appeal cannot be published (and thus cannot be cited) if the case is reviewed by the supreme court.

At the time this chapter goes to press, amendments to Cal Rules of Ct 976–977 to conform the rules to post-May 6, 1985, procedure have not been adopted and cannot be predicted with certainty. It seems likely, however, that decisions ordered published by the court of appeal will not automatically be depublished by acceptance for supreme court review and that published opinions may be given some precedential or advisory effect on issues not accepted for review by the supreme court.

Rule changes adopted before May 6, 1985, implementing the constitutional amendment will be discussed in §22.1. Readers should also consult the current version of the California Rules of Court for later changes. All future changes will be discussed in later supplements to this book.

APPENDIX E

COPY OF PAGES 743-747 OF 9 WITKIN, CALIFORNIA PROCEDURE, THIRD EDITION, CONTAINING A REVIEW OF APPELLATE DECISIONS WHICH HAVE EXPRESSED THE VIEW THAT THE DENIAL OF A PETITION FOR A HEARING BY THE CALIFORNIA SUPREME COURT IS SIGNIFICANT, AND HAS A SPECIAL MEANING.

(Reference: Petitioners' Supplemental Brief at page 17.)

CALIFORNIA PROCEDURE

Third Edition

by B. E. WITKIN
of the San Francisco Bar

Volume 9

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(d) Effect of Denial of Review.

(1) [§775] View That Stronger Precedent Established.

Attorneys commonly regard court of appeal decisions in which hearings were denied as weightier precedents than those in which no hearing was sought. And many a court of appeal justice shares this view, as may be seen from numerous pronouncements to the

effect that such decisions come close to Supreme Court decisions as authority in the courts of appeal. The following are typical:

Bridges v. Fisk (1921) 53 C.A. 117, 122, 200 P. 71. "The decision, therefore, possesses all the authority of a pronouncement by the supreme court itself."

Masonic Mines Assn. v. Superior Court (1934) 136 C.A. 298, 300, 28 P.2d 691. "A transfer was denied by our Supreme Court and we are bound by the decision."

Walls v. System Freight Service (1949) 94 C.A.2d 702, 703, 211 P.2d 306. In view of denial of a hearing, "any statements" in a prior *Supreme Court decision* "were overruled by the later decision."

Allstot v. Long Beach (1951) 104 C.A.2d 441, 446, 231 P.2d 498. "So far as we are concerned, the denial of a hearing in a case which decides questions of such widespread interest and importance means that they were fully considered by the Supreme Court and were not deemed to have been decided incorrectly."

Housing Authority v. Peters (1953) 120 C.A.2d 615, 616, 261 P.2d 561. "Therefore we are bound by the foregoing decisions, the correct rule being that when the precise question of law has been decided by a District Court of Appeal and the Supreme Court has denied a hearing, such decision will be followed as settling the law in the absence of a later decision of the Supreme Court overruling or modifying the prior case."

Victory Oil Co. v. Hancock Oil Co. (1954) 125 C.A.2d 222, 228, 270 P.2d 604. "[I]t must be assumed that the Supreme Court thereby approved the unequivocal decision in Sahlender."

Barry v. Department of Public Works (1962) 199 C.A.2d 359, 360, 18 C.R. 637. "The Supreme Court having considered the same arguments which are now made to us, and having, by denial of hearing, apparently found them unconvincing, the appellants here are asking us not only to overrule the District Court of Appeal . . . but also effectually to overrule the Supreme Court. This we cannot do."

People v. Hasson (1968) 265 C.A.2d 865, 866, 71 C.R. 664. "In a case like the *Romo* case where the Court of Appeal was divided, . . . the failure of the Supreme Court to grant a hearing upon petition seems to us to be equivalent to a decision by that court in accordance with the majority opinion in the Court of Appeal." And "We are, of course, bound by holdings of the Supreme Court."

To similar effect are *Norwood v. Judd* (1949) 93 C.A.2d 276,

284, 288, 209 P.2d 24 [court declined to follow an earlier court of appeal decision in which no hearing was sought, on the ground that a later conflicting decision, in which a hearing was denied, had, in legal effect, overruled the first one]; *People v. Rowland* (1937) 19 C.A.2d 540, 542, 65 P.2d 1333; *Bock v. Oakland* (1937) 19 C.A.2d 115, 117, 65 P.2d 1098; *Clover v. Jackson* (1927) 81 C.A. 55, 59, 253 P. 187; *People v. Whitaker* (1924) 68 C.A. 7, 11, 228 P. 376; *Zerbe v. United Railroads* (1922) 56 C.A. 583, 586, 205 P. 887; *Estate of Brissel* (1963) 218 C.A.2d 841, 844, 32 C.R. 458 [rule of *Housing Authority v. Peters* "is well settled"]; *Levy v. Bellmar Enterprises* (1966) 241 C.A.2d 686, 692, 50 C.R. 842 [following *Housing Authority* case]; *Burns v. State Comp. Ins. Fund* (1968) 265 C.A.2d 98, 102, 71 C.R. 326; *In re Henley* (1970) 9 C.A.3d 924, 931, 88 C.R. 458, citing the text; *People v. Crafts* (1970) 13 C.A.3d 457, 459, 91 C.R. 563; *Knowles v. Work. Comp. App. Bd.* (1970) 10 C.A.3d 1027, 1032, 89 C.R. 356 [court of appeal decisions in which hearing was denied deemed to distinguish out of existence a prior Supreme Court decision]; *Maillet v. Work. Comp. App. Bd.* (1972) 23 C.A.3d 107, 110, 99 C.R. 925 [hearing in Supreme Court denied in prior case raising identical issue; decision stands as one of court of last resort]; *Phillips v. Bartolomie* (1975) 46 C.A.3d 346, 351, 121 C.R. 56 [denial of hearing is "not without significance," quoting *Di Genova*, infra, §776, and citing the text]; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1017, 140 C.R. 168, citing the text [same].

The contrary view was expressed in many cases, and that view was restated in the new rules *review* in the Supreme Court. (See infra, §776.)

(2) [§776] Contrary View.

During the early period, prior to the strong declarations discussed in the preceding section, the Supreme Court flatly rejected the notion that its discretionary denial of a hearing, for undisclosed reasons, could be interpreted as a positive approval, and adoption of the point of law decided by the court of appeal. Thus, in the leading case of *People v. Davis* (1905) 147 C. 346, 350, 81 P. 718, supra, §696, the court said that "the denial in any case . . . is *not to be taken as an expression of any opinion by this court*, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, *nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion.*"

Similarly, in *Bohn v. Bohn* (1913) 164 C. 532, 537, 129 P. 981, the opinion states: "But an order by this court, refusing to transfer a cause after judgment in the district court of appeal, does not adopt the opinion of the appellate court so as to give it, in this court, the authoritative effect which one of our own decisions would have." (See also *Western Lithograph Co. v. State Bd. of Equalization* (1938) 11 C.2d 156, 167, 78 P.2d 731; *In re Stevens* (1925) 197 C. 408, 423, 241 P. 88; *McMillan v. Greer* (1927) 85 C.A. 558, 563, 259 P. 995; *Prescod v. Unemp. Ins. App. Bd.* (1976) 57 C.A.3d 29, 39, 127 C.R. 540, citing the text; 13 So. Cal. L. Rev. 463.)

Practical evidence of the Supreme Court's view is furnished by examples of disapproval of cases in which a hearing was denied only a few years before the disapproving decision. (See, e.g., *Estate of Rattray* (1939) 13 C.2d 702, 716, 91 P.2d 1042 [repudiating rule of *Estate of Miller* (1937) 23 C.A.2d 16, 71 P.2d 1117]; *Zaragosa v. Craven* (1949) 33 C.2d 315, 320, 202 P.2d 73 [repudiating holding of *Franklin v. Franklin* (1945) 67 C.A.2d 717, 155 P.2d 637]; *Lewis & Queen v. Ball Sons* (1957) 48 C.2d 141, 154, 308 P.2d 713 [disapproving *Marchett v. Gould* (1955) 131 C.A.2d 821, 281 P.2d 524]; *People v. Butler* (1966) 64 C.2d 842, 845, 52 C.R. 4, 415 P.2d 819 [disapproving *Arata v. Superior Court* (1957) 153 C.A.2d 767, 315 P.2d 473, and its progeny].)

Nevertheless, the Supreme Court has never undertaken to examine and expressly reject the view espoused by the formidable list of court of appeal opinions (supra, §775), and some time ago, took a middle position which perhaps indicates a change of thought: "Although this court's denial of a hearing is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of this court . . . it does not follow that such a denial is without significance as to our views." (*Di Genova v. State Bd. of Education* (1962) 57 C.2d 167, 178, 18 C.R. 369, 367 P.2d 865.)

A difficult situation arose when courts of appeal, interpreting and applying Supreme Court decisions, rendered decisions limiting their effect. If the Supreme Court denied hearings in these cases, did this indicate acquiescence in their results and retreat from the rule announced in its own decision? In *People v. Triggs* (1973) 8 C.3d 884, 890, 106 C.R. 408, 506 P.2d 232, the court emphatically rejected this notion:

"Preliminarily we declare that our refusal to grant a hearing in

a particular case is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this court. Our statements of law remain binding on the trial and appellate courts of this state . . . and must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which we have declared the applicable principle of law. Our refusal to grant a hearing in any given case must not be deemed a sub silentio overruling of our prior decisions.'" (8 C.3d 890.)

The latest word on this subject appears in the Comment of the Advisory Committee on revised Rule 28 (supra, §711). After observing that "[i]t has long been established in California law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause" (citing *People v. Davis* and *People v. Triggs*, supra), the Committee states: "Adoption of the new 'review' procedure does not affect this legal doctrine, and denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion."

APPENDIX F

COPY OF TRANSCRIPT OF THE FRONTLINE P.B.S. DOCUMENTARY, "DEATH OF A PORN QUEEN", CONCERNING THE TWO YEAR PERIOD IN THE LIFE OF COLLEEN APPLEGATE FROM HER INITIATION INTO THE PORNOGRAPHIC TRADE AT AGE 18 BY JAMES MARVIN SOUTER, THE DEFENDANT IN PEOPLE V. SOUTER ET AL (JIM SOUTH OF WORLD MODELING AGENCY IN FREEMAN CASE) TO HER DEATH AT AGE 20 IN MARCH OF 1984.

(Reference: Petitioners' Supplemental Brief at page 20. See also pages F-7, F-8, F-11 and F-12).

FRONTLINE

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She was from Minnesota. Young, pretty and fresh. She went to Hollywood in search of a dream, and found herself in X-rated movies, on drugs, and estranged from her family and friends. After two years as a porn queen, she took her own life and left only questions about how this could happen.

INTRODUCTION

NARRATOR
Tonight on FRONTLINE. A girl from Minnesota becomes the star of porn films.

BOBBY HOLLANDER
She enjoyed the recognition. She enjoyed the money.

NARRATOR
An eighteen-year-old innocent looking for adventure and finding a world of money, drugs, and sex in front of cameras.

LAURIE SMITH
Colleen Appplegate did not like doing sex on film. Period.

BOBBY HOLLANDER
She chose to do it. She could have stopped.

NARRATOR
A young life ends with a gunshot and questions. Tonight: "Death of a Porn Queen."

JUDY WOODRUFF
Good evening. This is the story of an ordinary young woman who wandered into a strange world and died. It's also about dreams, values, choices... families and children...and drugs. And, it's about pornography. Not pornography's effect on those who see or hear it...but about some of the people who work in that "industry" and its effect on them.

The program contains some partial nudity and graphic scenes and language which may offend some viewers. It is not suitable for viewing by children. We recommend parental discretion.

The program is called "Death of a Porn Queen," produced for FRONTLINE by Andy Greenspan, directed by Paul Henschel and reported by Al Austin of WCCO-TV in Minneapolis.

NARRATOR
This is where the story ends--Palm Springs, California, early in the evening, March 21, 1984. A young woman lay thrashing on her bed with a bullet wound through her temple. A rifle lay beside her.

BRENDA ROUSENOU, Friend
I went over to her, and she was laying there, there was like two mattresses pushed together on the bed and there was like a crease and there was blood going all the way down the crease, but you couldn't see any blood on her, and...

DOCTOR
Her condition was hopeless. She was comatose and she was going to die.

Jackson, Detective: *Het, Elner, could I see the weapon in the Applegate shooting, please? Okay, this is the weapon that was found at her side.*

Interviewer: *How do you think she shot herself?*

Jackson: *She would have been laying down on the bed, with the gun on the bed, propped on her arm, possibly with her thumb or other finger to the gun and the bullet would have passed through her head and into the wall where we found it.*

NARRATOR
She was known as Shauna Grant, a star of X-rated films, Her real name was Colleen. Colleen Applegate. From Farmington, Minnesota. She left home when she was 18. When she died, she was 20.

Colleen lived here for a while--an apartment house near Hollywood. In the spring of 1983, a few months before her death, she suddenly moved out.

Interviewer: *I wonder if she left anything here?*

Landlady: *Yeah, I have some things that I was to send to her mother, but never did. You're welcome to them.*

Interviewer: *She got two of these.*

Landlady: *Pictures, and terrible books. A lot of pictures.*

Interviewer: *What's this one?*

Landlady: *Let's see here. She was pretty. Very pretty.*

Interviewer: *That's a beautiful picture.*

Landlady: *Yeah. Hmmmm.*

Interviewer: *Was that what she looked like?*

Landlady: *Yeah, yeah. Her hair is a little longer, a little big longer than shoulder length. Blonde, like strawberry blonde. Very pretty. These are just, you know, I guess her high school things.*

Interviewer: *A diploma.*

Landlady: *Yeah. Diploma, letterz, school letters. I guess they were for cheerleading.*

NARRATOR
High school diploma, old snapshots and valentines, her confirmation certificate from the Catholic Church...and a copy of *Hustler* magazine with her picture on the cover. These are like the belongings of two people, as though Shauna Grant had kept Colleen Applegate's things, dragged them with her from place to place...and finally left them behind.

When did one person become the other? How does an ordinary small town girl like Colleen Applegate become a Hollywood porn queen? And then what happened to her? She shot herself. But why? How did she get so far from home?

THERESA SICHENEDER, Friend
She was an everyday girl, just like everybody else. I mean, she was in cheerleading, I was in cheerleading...

NARRATOR
Theresa Sicheneder was one of Colleen's closest friends from the sixth grade on.

THERESA SICHENEDER
She always appeared happier than she was. I remember that she was so unpredictable. You never knew what she was thinking. You never knew what she was going to do next unless she'd share it with you.

PHIL APPLEGATE, Father
Colleen was more private or more inside of herself I think than our other kids have been.

NARRATOR
Colleen's parents, Phil and Karen, still live in Southern Minnesota. Recently, they divorced.

KAREN APPLEGATE, Mother
I was very strict with Colleen. To me, right's right, and wrong's wrong. It still is. But as long as it doesn't go too wrong, they're going to do what they want to do anyway.

PHIL APPLEGATE
I maybe tried to run the house like a business. And I realize that isn't a good way to run the house sometimes. Maybe I come off that way, but I learned over the years too, but I think when she was going to high school she was in...I expected certain things. I realize I was a tough father. I wasn't an easy father. And I don't know whether that was a mistake or not, because I was just as tough on the other kids, too.

KAREN APPLEGATE
She was the oldest of five. But there was nothing strange or abnormal about her childhood. It was an average childhood. She loved to read. She used to write poems. She spent more time reading than watching TV. She wasn't very good at house cleaning, but she liked to cook. Our relationship with Colleen was fine until her junior and senior year. Then we had a lot of arguments.

NARRATOR
At about that time, she began to date a boy named Mike Marcell, who was two years older.

THERESA SICHENEDER
She started liking boys, and showing it. And she knew that she could get almost anyone she wanted to. I think that's when she really started liking boys.

Brenda Rosenou: *This was her graduation year, Colleen?*

Colleen Behir: *Yeah.*

Brenda Rosenou: *Because this is the year we graduated. '81. She wrote on the back page, "Brenda, it's been a long time, hasn't it?"*

NARRATOR
Two of Colleen's oldest friends live now in Southern California. Brenda Rosenou and Colleen Hehir. They grew up with her and both moved to California at about the same time she did and stayed in touch with her to the end.

Brenda Rosenou: *"...no matter how far we are apart, we'll always be close at heart, and we'll always keep in touch, even if one of us ends up in dumb-fuck Egypt. But anyway, I think I've used up enough space. Be good, Brenda, keep smiling and don't do anything I wouldn't do. Love, Lena." God, it's been a long time since I read that.*

Colleen Hehir: *I think she was a little bit different. She had different ideas, I think, than anybody else. She had these dreams of what she wanted, and she wanted to be a model. And back then we didn't really have set dreams or goals. And she did.*

Brenda Rosenou: *It was a small town you know, population of what was it, 4800 people at the time?*

Colleen Hehir: *Now. It was even less then.*

Brenda Rosenou: *Yeah. And everybody knew what you were doing before you did it. There was never really anything to do.*

Colleen Hehir: *I think it bored everybody.*

Brenda Rosenou: *Yeah.*

NARRATOR
Colleen stayed in Farmington a while after high school working first as a cashier, then as an employee of the telephone company. There, one night in December, she swallowed a bottle of pills. She was rushed to the hospital.

Phil Applegate: *We took her to the emergency. And they pumped her stomach. It was basically that...it wasn't so much that she wanted to kill herself as it was that she wanted some attention, and she thought that was a way of getting it.*

Interviewer: *Did you and Colleen ever talk about it?*

Phil Applegate: *To be honest, no, I don't think we did. I don't think we really sat down and talked about it. We went to the counselor with her as a family.*

Karen Applegate: *And then they had one group session—with the whole family. All of us were in there. And they tried to get us to talk, of course, we're all sitting there and looking at each other. Nobody's saying much. And I was very angry. I don't...I still don't feel that she took that...maybe that was the beginning sign and I didn't know it, of a problem. I thought she did it for attention.*

After she took the pills, living in a small town can really be the pits sometimes. A lot of people were talking about it. And a lot of people were on her case. She wanted to get out of here.

NARRATOR
Colleen and her boyfriend, Mike Marcell, headed west.

Interviewer: *Why do you think she went to California?*

Phil Applegate: *To be somebody.*

NARRATOR
Los Angeles, that first spring, was no more fertile ground for Colleen's vague ambitions than Farmington, Minnesota had been.

Brenda Rosenou: *All I know was that I had talked to her a couple of times and they couldn't...neither one of them were having very good luck finding a job. And Mike was getting real upset. He wanted her to find a job, because he couldn't get a job.*

And he found, from what she told me, he's the one that found the ad for modeling.

Colleen Hehir: *It was just in the newspaper.*

JIM SOUTH, World Modeling Agency
It's two girls, one guy simulation. Yeah. There's no colored guys. Hello? Okay. He needs you at ten a.m. Friday.

NARRATOR
This is the man that Colleen went to see in the spring of 1982. His name is Jim South.

JIM SOUTH
Can you write this early in the morning?

NARRATOR
He runs an agency called "World Modeling."

JIM SOUTH
What we do is we're licensed to get you work with professional photographers. The majority of the work we get is nude photographic modeling. The pay does run from one hundred a day to fifteen hundred a day depending on who's shooting you. Now the two different type shootings we have--we have single girl--you modeling alone, like you see in Penthouse. We also have simulation, you lucky devil.

NARRATOR
A documentary crew led by Wendy Apple shot these scenes of South as he interviewed a new model named Kim.

JIM SOUTH
...you are touching. You look like you're doing something but you're not.

WENDY APPLE, Documentary Producer
Jim South is indeed an agent.

NARRATOR
Apple was making a film called "Fallen Angels."

WENDY APPLE
And he is absolutely the medium, the way in which girls who know nothing about Hollywood or movies or pornography come into the porno industry. They have to pass through him--they don't have to but that's the way his business is set up.

JIM SOUTH
Give me a shot of you close to the stool with your right foot on the bottom ledge.

WENDY APPLE
He said that he can get new girls work very fast. There's always a job for a new girl.

NARRATOR
South showed his Polaroids of Colleen Applegate to *Penthouse* photographer Steve Hicks.

Steve Hicks: *Up, down, up, down, up, down.*

STEVE HICKS, Penthouse Photographer
I don't equate what I do with X-rated films, whatsoever. I mean, what I do is photograph women and attempt to create beauty out of their bodies.

Steve Hicks: *Okay, why don't you stand again. Stand and let me see you bring, start to bring your jeans down a little bit, just slowly. Keep going. I'll tell you when to stop.*

STEVE HICKS
Colleen, was, was a beautiful girl. Um, and I think very unaware of it. Um, you know, she was the type of girl that when she walked in, she looked in many ways like she just came right off the farm. But in makeup she was a very beautiful girl. And she really took to modeling quickly. You know, it's unfortunate that Mother Nature put 18-year-old girls on this planet with beautiful bodies because you know the mind of a typical 18-year-old is not prepared to make the right decisions in this town with these opportunities.

NARRATOR
Hicks advised Colleen to get out of nude modeling quickly because it leads downhill. After all the magazines have used her, the only thing left is X-rated movies. She ignored the advice and soon was posing for raunchier magazines.

Colleen Hehir: *And she invited us up so we went to her house for the weekend and that's when we found out.*

Brenda Rosenou: *That's the first time we saw the pictures and all that.*

Interviewer: *What sort of pictures were they?*

Brenda Rosenou: *Shocking pictures.*

Colleen Hehir: *We didn't expect...*

Brenda Rosenou: *We didn't know, you know, when she said modeling and then she finally told us it was nude. Well, you think of like Playboy, you know, and then the pictures we saw though were like, from...*

Colleen Hehir: *More hard core pictures.*

Brenda Rosenou: *Yeah, like Erotica and what was that other magazine? Velvet, stuff like that. And she just had the Polaroids, the instant pictures of her and some guys. They were pretty...We both, you know, she just pulled them out and starting showing them to us and we just looked at each other and our mouths were like down to our knees.*

Colleen Hehir: *She didn't explain it. She had been kind of covering it up.*

Brenda Rosenou: *She didn't come right out and say, "Well I did this with this guy and I did this with this girl."*

She, she um, you could tell she felt bad because she wouldn't tell us the whole story, you know. And then, you know, it even went so far as her trying to convince us to do it with her.

Colleen Hehir: *You know, making it so it wouldn't be as bad.*

Brenda Rosenou: *Yeah.*

Interviewer: *What would she say to that?*

Colleen Hehir: *She had appointments set up with her manager to go in and the whole bit and we're just like "Well, I don't think so."*

Brenda Rosenou: *She said it was easy and...*

Colleen Hehir: *She said well, just go and talk to him. You know. It's good money, you know, you can just do it like on the weekends. Come out here and you don't have to take your clothes off if you don't want to.*

Brenda Rosenou: *Which, you know, seeing the pictures you knew you would have to take your clothes off.*

Interviewer: *How important do you think it was to Colleen that you approve of what she was doing.*

Brenda Rosenou: *I think it was real important.*

Colleen Hehir: *Very, very important to her.*

Brenda Rosenou: *Because I think she knew that nobody that was in her life before did approve.*

STEVE HICKS
You know, you take the typical girl that's used to working at MacDonald's or at the shoe store making a minimum wage and suddenly she's given the opportunity to get made up and be in front of people that tell her she's beautiful and make as much money in a day as she was making in three weeks, and they change. They change. And that's sad.

NARRATOR
Mike Marcell, Colleen's boyfriend, soon left her and returned to Minnesota where he spread the news that Colleen was involved in pornography. Marcell won't discuss it now. He says he just doesn't care about her.

The Applegates heard the stories about their daughter and flew at once to Los Angeles.

PHIL APPLEGATE
We knew that she was working through this World Model Agency, so we went up to the offices up there and saw Jim South and saw what was going on and asked if Colleen worked for him and he said yes and then he said well she's

PHIL APPLEGATE (Cont.)
right in there and he threw this book at us. And there was nude photographs of Colleen you know, among other girls and I guess you could come in and pick who you wanted to model for you and that's how they...And we said how can you let an 18-year-old girl involved in this? Well, she's 18 and she's of age of consent and blah, blah, blah.

COLLEEN HEHIR
They wanted her to come home and they were like ordering her you know, giving her no choice, which I think was a mistake because she didn't listen to them in high school, why would she listen to them now?

Interviewer: *And did that cause a rift between you?*

Karen Applegate: *Yes, I didn't hear from her for...well, it seemed like eternity but it was probably two months. I didn't hear a word and I didn't know where to call her. I mean I left there and then all the way home I kept thinking why did we do that. We could have, you know, found out where she was living, found something. I didn't know how to find her.*

Jim South: *Okay. I'm at 4523 Van Nuys Boulevard. Now it is a small office building. It's suite 203.*

NARRATOR
By this time, Colleen had posed for almost every men's magazine.

Jim South: *Could you come in tomorrow? Well, what's convenient for you?*

NARRATOR
Producer Wendy Apple happened to be filming in South's office when Colleen dropped in.

Jim South: *Okay, have a good time. I'll see you tomorrow. Bye.*

Okay, well, we're, you and I are gonna undress and we're...you don't have enough money just be nice.

Colleen Applegate: *Who doesn't have enough money? You don't have enough money.*

Jim South: *World Modeling. Okay what's the name of the paper please you saw the ad in? Okay. May I ask your age?*

NARRATOR
Colleen was in South's office again when an adult film director named Bobby Hollander came in, looking for actresses for his next film.

BOBBY HOLLANDER, Adult Film Director
I wanted to use new girls who were just making the turnover. I didn't want to use a first-timer. And Colleen had done a piece prior to "Paper Dolls," just one. We sat and talked and she was wearing jeans, no shoes and a sweatshirt, and sitting on a table top. And I just got good vibes from her and she received good vibes from me. And I said this is gonna be easy.

It's all a matter of dollars and cents now. "Well," she said, "well I don't know about that." I said, "Well, what you don't know about, don't be ashamed to ask me. Because I like you. I don't want to take you to bed. Let's be friends." And in this business, she felt, wow, there's somebody that doesn't, you know, want to grab me. I've been in this a while. Those days are, they're past me already. You know, you don't have to sleep with anyone to get in the film. You have to sleep with them *on* the film.

"PAPER DOLLS" CLIP

Bobby Hollander: *Shauna, how old are you?*

Colleen Applegate: *I'll be 20 in a week.*

Bobby Hollander: *You'll be 20?*

Colleen Applegate: *Um hmm.*

Bobby Hollander: *I thought you were gonna be 19.*

Colleen Applegate: *No I am 19. I'll be 20.*

Bobby Hollander: *And how long have you been a paper doll?*

Colleen Applegate: *A paper doll?*

Bobby Hollander: *A model, a cover girl, a centerfold?*

"PAPER DOLLS" CLIP (Cont.)

Colleen Applegate: *About two months.*

Bobby Hollander: *Two months?*

Colleen Applegate: *Yeah.*

Bobby Hollander: *Did anybody twist your arm to get into the business?*

Colleen Applegate: *No not at all. It was all my idea.*

Bobby Hollander: *Really?*

Colleen Applegate: *Uh huh.*

NARRATOR
This is a scene from the first movie Colleen did with Bobby Hollander. He had renamed her Shauna Grant. She was not 19 but 18 at the time.

Bobby Hollander: *Are you still a virgin?*

Colleen Applegate: *No. Are you kidding?*

Bobby Hollander: *How old were you when you lost your virginity?*

Colleen Applegate *Almost 17.*

Bobby Hollander: *Almost 17. You almost lost it or you did lose it when...*

Colleen Applegate: *I did lose it when I was almost 17.*

BOBBY HOLLANDER
I said to her you have the capability of being a star. Because one day and it's going to happen fast, once they put a little makeup on you, put some high heels on your feet and stockings and a garter belt, like they do in the picture layouts, the public is going to fall in love with you.

LAURIE SMITH, Ex-porn Star
Bobby could talk a nun into doing a porno movie.

NARRATOR
Laurie Smith is a veteran adult film actress and make-up artist. She became Colleen's closest friend. After Colleen died, Laurie gave up acting and moved away from California.

LAURIE SMITH
You know, I always look like such an elegant lady on film, and I'm still like a little kid, a little tomboy in my real life. I never changed. From the day I came from Huntington Beach, I'm still a little beach bum girl.

SCENE FROM "NIGHT MAGIC"

Man: *I love it when you touch me there.*

Laurie Smith: *When I touch you where, Chuck?*

LAURIE SMITH
But in movies, give me a whip and put some make-up on me and I could say lick my boots to anybody.

NARRATOR
Laurie transformed Colleen.

LAURIE SMITH
When I first met her she was frumpy, schoolgirlish, wore funny, funny clothes and plain, and just didn't know about make-up, never really wore make-up, and just never, just kind of, you know, this kind of person.

"CENTERFOLD CELEBRITY" OUTTAKES

Colleen Applegate: *Production stills here we go.*

Jamie Gillis: *We kiss in a shadow...*

Laurie Smith: *Are you ready to go like this?*

Colleen Applegate: *Let's see a pose.*

LAURIE SMITH
Then after I was finished with her, her shoulders were back and her back was arched and her chin was up and she'd flip her hair around. And she would just...she became sexy. She became Shauna Grant.

BOBBY HOLLANDER
She looked like peaches and cream nude. Naked peaches and cream. And it was that Minnesota upbringing.

"SUMMER CAMP GIRLS" CLIP

Colleen Applegate: *This is the farthest I've been away from home on my own.*

Herschel Savage: *That's crazy.*

Colleen Applegate: *I haven't been anywhere.*

LAURIE SMITH
She got her little act down, you know, little girl from Minnesota and you know, up 'til the very end she used to say that I like wonder how many more years I'm going to get away with this Minnesota act.

Colleen Hehir: *We would tell her well you know if you want to get out...*

Brenda Rosenou: *There's another choice really...*

Colleen Hehir: *You can come stay with us. We'll find you a job. You know, letting her know that wasn't the only thing that there was for her. We couldn't tell her what to do. She was happy doing what she was doing. We were her friends. All we could do was back her up.*

Interviewer: *When you invited her to come live with you and to get a good job what did she say?*

Brenda Rosenou: *She always told me well "what could I do?" She goes, "I can't do anything. I can't type. I can't do this. I can't do that." You know she was...*

Colleen Hehir: *...not really putting forth the effort.*

Brenda Rosenou: *Yeah.*

Colleen Hehir: *Making up excuses. Well, I can't right now. I have this coming up. It pays real good. You know, and see--that's just it. Nothing that she could do would compare to the money she was making.*

Brenda Rosenou: *Yeah.*

Colleen Hehir: *And I think that was a big issue.*

"THE PERSONAL TOUCH" CLIP

Bobby Hollander: *And before I blast off my mouth and go any further let me introduce you to one of the stars of the business, Miss Shauna Grant.*

Colleen Applegate: *Hi.*

Bobby Hollander: *Hi, love.*

Colleen: *How ya doing? Thanks for the intro. Just write me and I'll send you a personally autographed picture.*

Bobby Hollander: *I thought she was adorable. I thought she was cute. I took a liking to her. I wanted to see it happen, where she got what she deserved, where she wasn't abused.*

Interviewer: *Any mind tricks she used to get through those sex scenes?*

Laurie Smith: *No. We'd just get high. We just always got high before we did it.*

NARRATOR
Colleen had begun to use cocaine. She returned to Minnesota for a visit in the fall. Her friend Theresa met her at the Twin Cities Airport.

THERESA SICHENEDER
The first time I saw her when she came back was when she got off the plane ...She wasn't really Colleen, the Colleen I knew. She seemed very uppity. You know, a little jumpy. Like she was a little anxious and the first thing she wanted to do was go into the bathroom and, you know, get a snort of coke.

KAREN APPLEGATE
She...her eyes looked wild. She wore a lot of make-up...and her hair--she was always very fussy about her hair, but she just--it was just brushed. It wasn't really fixed. She just, like she, just looked hard. She just

KAREN APPLEGATE (Cont.)
didn't look like herself at all.

PHIL APPLEGATE
And the subject of drugs--I guess I brought the subject up. I said I hope you're not involved in and staying away from all this cocaine and things like that. I said you really don't need that. And she said, "Oh you don't have to worry, dad," she says, "I go to parties where that's at but I don't do that." And because I'm a parent, I guess, and because it's my child, I guess I wanted to believe her.

KAREN APPLEGATE
I just didn't like what she was doing. She was flaunting her portfolio or whatever. And the pictures she showed me in the portfolio weren't nude pictures but they were very flattering pictures. But she hardly had anything on. And she wanted to give me one. She wanted me to pick one out. And she'd have, you know, give it to me. And I told her I didn't want any of those pictures.

NARRATOR
Magazines with Colleen's nude pictures had reached the stores in Farmington. In the high school, Colleen's younger sister found one of those pictures taped to her locker. Colleen had become not a celebrity, but an embarrassment.

Brenda Rosenou: *She went back to go to a friend's wedding, that was one of those girls that hung around with us, and she was kind of worried, and the things they're saying and the girl's mother wouldn't even let her in.*

Colleen Hehir: *She wouldn't let her in the church.*

Brenda Rosenou: *They didn't want her around.*

CONSUMER ELECTRONICS SHOW, LAS VEGAS

Woman: *Mmmmm, that felt great!*

NARRATOR
Despite appearances, this is serious business. The Consumer Electronics Show in Las Vegas. Twice a year these exhibitions give the porn industry a chance to show off its new films and its stars to the nation's videotape

NARRATOR (Cont.)
dealers.

GENA FINE, Porn Star
Triple X kisses. For your office wall? What are your clients going to say?

NARRATOR
Americans rented a hundred million X-rated video cassettes last year. Most of the companies that produce them are represented here. They have a pool of about 400 actors and actresses who are willing to have sex on camera.

PORN AWARDS

Announcer: *And the winner is, "Blame It On Ginger."*

NARRATOR
The X-rated performers have their own version of the Academy Awards.

Announcer: *What is this for?*

Woman #1: *It's for best shot-on-video sex scene. I'm not quite sure which one it is though--which scene.*

Woman #2: *Well, the film is nomated, it's up for best specialty film.*

Man: *"Bizarre Encounters."*

Woman #2: *"Bizarre Encounters." It's uh, you describe it dear. How would you describe "Bizarre Encounters?"*

Man: *It's, it is the world's first how-to, instructional, black comedy, hard-core bondage-and-discipline tape.*

Woman #2: *Ha, ha, ha, ha, ha.*

Barbara Dare, Porn Star: *And if you think I was hot in '86, watch for '87.*

NARRATOR
Twenty-one-year-old Barbara Dare is voted best new performer.

BARBARA DARE
I went home one day, and a girlfriend of mine that I had for a long time was acting different. And I said, "Why, because of what I'm doing?" And I told them, I said, "When I come..." point blank--I said, "when I come back in a couple of years and I'm over a hundred thousand dollars to do what I want with and open up a business, and you shits are still doing the same thing and sitting in a bar doing nothing," I said, "then you'll talk."

NARRATOR
Jeanette Littledove is another newcomer to adult movies. She's 19, from Oklahoma.

JEANETTE LITTLEDOVE, Porn Star
It just messes with your mind. It's addictive. You can't quit. Once you get hold of the money and you know it's there. And it's easy to get to and you don't want to quit.

NARRATOR
In 1983, Colleen Applegate attended one of these shows as the porn industry's new star. She had been unwelcome at a friend's wedding in her home town. But here people lined up to have their picture taken with her.

Bobby Hollander: *She had a line of a minimum of 40 people at a time. She saw the recognition...*

Interviewer: *And she liked it?*

Bobby Hollander: *Yeah. She became Shauna Grant.*

Interviewer: *At that show?*

Bobby Hollander: *Yeah. She became Shauna Grant. But Shauna Grant always was Colleen Applegate. I don't know which scared her more.*

DANIELLE MARTIN, Porn Film Star
She was a little girl. She needed to be supported, you know, need to be told that everything was okay and that there were, you know, people there with her.

NARRATOR
Danielle Martin and Colleen began their X-rated acting careers at about the same time.

DANIELLE MARTIN
We met on a film, "Summer Camp Girls." She was like really nice, and we just started hanging out, best friends, very close.

You know, I will always make it on my own. And I know that. Even if everybody dumps me. But she couldn't, you know. She was holding on. She was too frightened to make her own decisions on what to do or anything like that.

"CENTERFOLD CELEBRITIES" OUTTAKE

Director: *Is your sound okay in there now? Okay fine. Slating "Centerfold Celebrities," Shauna and Jamie. Take one.*

Colleen Applegate: *Why would you want me to lay down?*

Jamie: *Well, just so you could be comfortable. I don't want you to strain.*

NARRATOR
Bobby Hollander directed Colleen in a series of hard core tapes that required only a day or two each to shoot.

LAURIE SMITH
Bobby is an okay person to work for. He's not pushy, mean, doesn't make you feel...I mean you may look cheap in the movie, but while you're doing it he makes you feel like a little queen, you know.

You know during the time you feel like you're doing "Gone With The Wind." So it's like one of those things. It's not hard for Bobby. He didn't talk her into it. She wanted to do it.

BOBBY HOLLANDER
Shauna was a talent. She was a star. There are stars in the business. Shauna Grant made herself a star in a short period of time, the quickest I've ever seen.

NARRATOR
Colleen's movies and modeling made her almost $100,000 in one year. She spent most of the money on cocaine.

LAURIE SMITH
She needed it like you feel like you need it, you know as a security blanket. I mean we just liked to do it. We did a lot though...she and I. That one year, in the year and a half actually that I really hung around with her a lot...'cause we'd always go in on it together and we always would buy a lot.

Bobby Hollander: *I may have done cocaine with both of them. But on selling either one...I wasn't selling cocaine. I was a user.*

Interviewer: *Did you give Colleen cocaine?*

Bobby Hollander: *I think I gave Colleen as much cocaine as she gave me.*

LAURIE SMITH
It was the perfect thing to have. You could go smoke a joint, unwind from the first scene and then right before you go you take a toot.

NARRATOR
These are outtakes from a movie Laurie and Colleen did with Bobby Hollander.

"PERSONAL TOUCH" OUTTAKES

Bobby Hollander: *She's gonna dust off the -- screen!!*

Laurie Smith *Okay!! I just--every time I, I mean, uuggghh!!*

LAURIE SMITH
Once I saw Bobby started freebasing--that was the last time I worked for Bobby and that was the last time I would ever work for him and I was really up--pissed off!!!

"PERSONAL TOUCH" OUTTAKES

Colleen Applegate: *I'm listening.*

"PERSONAL TOUCH" OUTTAKES (Cont.)

Bobby Hollander: *No, no. You ain't listening to shit.*

Laurie Smith: *We are listening to everything. You walk away.*

Colleen Applegate: *I know exactly...I'm listening.*

Bobby Hollander: *I don't want you to say anything. I just want you to listen to me.*

Laurie Smith: *Okay Bobby.*

Bobby Hollander: *Laurie, deep inhale.*

Laurie Smith: *I know, but let's get this...*

Bobby Hollander: *Doesn't that...okay do you see what--I think--you're saying this--you can read it right from the script.*

Laurie Smith: *I know exactly how you want it.*

LAURIE SMITH
He was just crazy. He couldn't make up his mind what he wanted to do. He had this script that he'd written probably when he was on his third day awake. But it was so sadistically disgusting. And I just said Colleen, forget it, just forget Bobby. Go off on your own. You got your name now. You're big enough where you can do it on your own.

Bobby Hollander: *I told you, yes we are shooting, we are shooting, we are rolling, we are rolling.*

NARRATOR
Bobby Hollander is on probation for cocaine possession. Each weekend he must clean up highways for the California Transportation Department.

BOBBY HOLLANDER
I've been here 16 or 17 days working with this crew. Some of the finest guys in the highway and freeway business.

NARRATOR
Colleen was making as much as $1,700 a day when sex scenes were shot.

LAURIE SMITH
She hated it. She hated it. She just laid there and just let it happen. Colleen Applegate did not like doing sex on film. Period.

JERRY BUTLER, Porn Star
She was just so overwhelming because I knew the girl did not want to be there. It was so shame--y'know, so shameful...

NARRATOR
Jerry Butler, one of Colleen's co-stars believed she did not belong in adult films, but others kept encouraging her.

JERRY BUTLER
Everybody said it was okay. Hey, put this skirt on. You look like a million, Colleen. Oh you look great. I mean, uh Shauna. You look fabulous. Oh, great. Take the picture. Oh, terrific. Oh, this is great. Oh, great sex scene. Oh, terrific. These are the people that are still alive. These are the people that made money, that are still making money off this poor little girl. Getting her to think that that's all she needed in life.

Bobby Hollander: *She enjoyed the recognition. She enjoyed the money. There's no question about that.*

Interviewer: *Okay, but she was an aimless girl, she was vulnerable. Don't you think that life is harmful to a person like that?*

Bobby Hollander: *That's a loaded question.*

Interviewer: *Yeah, it is.*

Bobby Hollander: *It's a loaded question. I think anyone who's in Colleen's age group, they're all in the same situation.*

Interviewer: *Okay.*

Bobby Hollander: *She chose, she chose to do it. She could have stopped, and made less money and just have been a photographer's model, but I personally think she enjoyed doing it. Colleen was an exhibitionist. Colleen was two different people on camera and off camera. Two different people. Jekyll and Hyde. Completely.*

Interviewer: *It was her choice. But wouldn't it have been better for her to stop?*

Bobby Hollander: *Well, talking about it today, yes, it would have been better.*

"CENTERFOLD CELEBRITIES" OUTTAKES

Colleen Applegate: *Can you tell someone to bring my bathrobe in here. I forgot to bring it in.*

NARRATOR
In that one year Colleen performed in over 30 X-rated movies. She had an abortion. She contracted herpes. She performed sex on camera with 37 men.

JAKE EHRLICH, Former Boyfriend
The thing I notice mostly about is how quiet it is here now. There used to be noise. There used to be life here.

NARRATOR
Jake Ehrlich is a former cocaine dealer. He returned to his home in Palm Springs, California, this winter after almost three years in prison.

JAKE EHRLICH
There's just an empty feeling, you know, as if I left, you know last week. And coming back to absolutely zero.

Now you see how our bedroom was set up. Used to keep the stereo over there. And there's a patch there that bothers me. That's the patch the police pulled out. They made a patch and someone tried to patch it up. And it bothers me to sleep next to it.

The bullet went through her head. I don't know how she was lying or how she was even shot. I never even knew. But the bullet went through her head and into the wall. Some of her clothing is still here, not much, I find a piece here and a piece there.

NARRATOR
Jake met Colleen in the spring of 1983 after he saw pictures of her in *Penthouse* magazine.

JAKE EHRLICH
I opened it up and I saw the section she was in and I said this girl's gorgeous, this girl's for me. Bobby Hollander's her agent and he'll come around.

NARRATOR
He learned that Colleen's manager was Bobby Hollander, one of his cocaine customers.

Jake Ehrlich: *He brought her over and this little girl with like just washed hair, you know, curling up and a little Gumby t-shirt and a pair of jeans. And I said no this couldn't be the girl. This girl is maybe 14, 15, 16 years old. But it was her you know. Not what I expected. Not the fantasy. It wasn't the fantasy from the magazine. She came here and she never left.*

Interviewer: *She just stayed?*

Jake Ehrlich: *She just stayed. She found home.*

Interviewer: *And she quit doing pornography.*

Jake Ehrlich: *She just stopped dead. She was very happy in the very beginning. Very exuberant, happy person. She'd call up everyone. I'm in love. I love Jake. You know people would tell me, Jake this girl really loves you. And it started building up. She would call home for recipes, to her parents. "I'm not in the business no more, and give me the recipe for that. I'm cooking for Jake."*

NARRATOR
Sometimes, late at night, with the stereo on, Colleen tape-recorded her thoughts.

ON TAPE

Colleen Applegate: *You amaze me, Jake. Here I am 20 years old and in love with a man twice my age. You let me be Colleen. And you don't expect me to be anybody else. You respect me and you care about me, and you at least like me.*

JAKE EHRLICH
She was basically happy living here. She was safe from the outside world.

NARRATOR
Colleen stopped making adult films but the people she had met in that business often came to visit her at Jake's.

THERESA SICHENEDER
There was always drugs around. It was like a non-stop party.

NARRATOR
Her friend Theresa came from Minnesota to see her once.

THERESA SICHENEDER
Well, I remember a bad experience at one of these parties that I was offered something that I thought was a joint and it was something called "Jerry Lewis' Kids"; it made you feel retarded. And that was the point I decided I shouldn't be there. It scared the heck out of me.

I believe Colleen was dependent on Jake for her habit, and because he had a beautiful house. She was very dependent on people.

JAKE EHRLICH
We just started drifting a little bit apart. You know, I couldn't supply her with the amount of attention she needed.

She couldn't...she would follow me from one room to another. It's just something I couldn't take. I just couldn't take it. So I'd constantly push her off.

NARRATOR
Jake didn't know it, but Colleen had become involved with a college student during a trip back to Minnesota.

He doesn't want to be identified.

COLLEGE STUDENT
She just seemed like someone who had made a mistake and she didn't want to be doing it anymore, according to her, and I mean, she was friendly and intelligent, and pretty and fun to be with, we had a great time.

THERESA SICHENEDER
Now, she told me that she was going to marry him and I don't know if he, if they'd actually talked about that. But in her heart, that was her dream. To marry him. Come back, go to school. Be a regular college student. Use her mind, 'cause she had a good mind, and marry him.

NARRATOR
And yet Colleen stayed with Jake. And her cocaine addiction worsened.

JAKE EHRLICH
It's hard for a cocaine dealer to control someone that's close to you. Especially if you're selling it. How can you say you shouldn't do it. It's no good for you. Meanwhile, I'm doing it myself and I'm selling it.

BRENDA ROSENOU
She got real thin. She was real pale. Wasn't eating. She just looked sick. You know, and, and I would always ask her, I would say, "Why, why do you keep doing it? Why don't you stop for a while?", you know. She's like, "I'm okay. I don't do it that much." You know, and I'd say, "Well look at you, you're, you know, 90 pounds!"

NARRATOR
Jake urged her to get psychiatric help. She refused. And one night he told her she'd have to move out.

Jake Ehrlich: *She said, if that's the end, I'll show you. She runs into my bedroom and I hear her pick up my rifle and it goes click, click, and I run in there real fast. I didn't take her serious. I figured she just wants attention. She wants something. I ran in there quick enough that she had the rifle cocked.*

Interviewer: *She hadn't pulled the trigger?*

Jake Ehrlich: *No, no.*

Interviewer: *She cocked the rifle...*

Jake Ehrlich: *She cocked it.*

Interviewer: *And it was loaded?*

Jake Ehrlich: *It was loaded. I kept a rifle, it was a 22 rifle the same rifle she took her life with. But I didn't take her serious, you know, I figured she just wants attention. She's mad and you know, and I could handle situations. You know. Either you know we sat down on the bed, we talked and I says, "Alright, you don't have to move. You can stay here. And when you're ready, you'll move!" You know. I was scared.*

NARRATOR
A few days later in February, 1984, police arrested Jake for drug dealing. He was taken to jail and faced several years in prison.

EROTIC FILM AWARDS

Announcer: *The Adult Film Association of America proudly presents the eighth annual Erotic Film Awards. Adult movies have come of age.*

NARRATOR
Colleen had not made a hard core film in the ten months she lived in Palm Springs, but three of her earlier performances were nominated for awards.

Announcer: *Shauna Grant, for "Flesh and Laces." Parts One and Two.*

"FLESH AND LACES" CLIP

Colleen Applegate: *My rate's a hundred dollars an hour.*

Man: *Are you worth that?*

Colleen Applegate: *Of course I'm worth it. You asked for a top model. You're gonna get it.*

Announcer: *Mr. John Leslie and Miss Shauna Grant.*

NARRATOR
She didn't win but it must have been an exciting evening for Colleen.

Francis Ford Coppola was seated at the same table.

NARRATOR (Cont.)
Colleen found she was still very much in demand. That night she agreed to make another adult film and was to begin shooting it in eight days. It was seven days before her death.

A few days after the awards show, Colleen's Minnesota boyfriend arrived in Los Angeles to see her. She never showed up at the airport.

LAURIE SMITH
Oh, there was a mixup. The fact that Colleen just totally disregarded the fact he was flying in...forgot. She forgot he was coming in. She'd made plans for two months to have him come out to, from Minnesota. And he finally got the time to come out, and she knew about it for two weeks, she knew. But then, when it came down to that day, we had gone to the awards and we had got wasted and then we were hanging out at my house, slept for two days. And we didn't know how we were gonna get there, because we didn't have a car. So we had to figure out a way to get there and that's what she was doing all that day was figuring out a way to get there and that's when Jake called and all the shit came down.

NARRATOR
Jake phoned Colleen from jail, told her their relationship was over. She would have to move out.

JAKE EHRLICH
I got this seed planted in my mind, the boyfriend's coming in town, uh, she didn't pay none of the bills. She says--destroyed the two thousand dollars on mostly drugs, limousines and partying. Uh, all these things are building in my head and I'm saying, hey man, *stop her. Now!!!*

NARRATOR
Colleen called her old friend, Brenda, and asked her to come over and keep her company while she packed.

BRENDA ROSENOU
And she was like real depressed. And she wasn't talking much. She was just kind of sitting around. She wasn't, you know, you could tell she wasn't happy at all.

NARRATOR
She'd run out of money...and cocaine. In two days she'd be performing sex on camera again. And now she had to pack and get out.

BRENDA ROSENOU
And the stereo was on and she went back into her bedroom.

ON TAPE

Colleen Applegate: *I remember the first time I really, really was lonely and depressed and down and I wasn't doing so hot. I was stuck and I had no one to depend on but me. That was the first time I really felt bad. And that was minute compared to what's come and what's happened since then...*

BRENDA ROSENOU
I heard a pop, like a loud pop, and I look, and she was laying there, there was like two mattresses pushed together on the bed and there was like a crease and there was blood going all the way down the crease, but you couldn't see any blood on her.

So I tilted her head up and I was just trying to see, you know, I was trying to look at her and I was like "Colleen, Colleen," 'cause she was still breathing.

KAREN APPLEGATE
A girl named Laurie called here at midnight our time. And was crying on the phone and asked if we knew about Colleen, and we didn't. And she said that, that, uh, she was in LA, but Brenda had called her and told her that Colleen shot herself. And she was just wondering if I knew and I didn't hear from anybody.

NARRATOR
At the hospital, machines kept Colleen alive for 24 hours. Her mother and friends were there.

DANIELLE MARTIN
And I had, had this ring that was a little heart with some diamonds on it, and, uh, I wore it on my wedding finger and I had asked um, Colleen's mom if I could give it to her. And she's like, are you sure, and? And you know, I, I gave it to her. You know, I was afraid to even touch her. It was like reaching and I asked, you know, can I? Can I touch her? You know she just looked so frail and everything. It was just so different to see someone with a bullet through their head, you can imagine...And, so I took it off my wedding finger and it wouldn't even fit on hers. It, her body was being kept alive by machines and circulation when it goes, your body swells up. And, and I just knew that she wasn't there. It wasn't her.

DANIELLE MARTIN (Cont.)
It wasn't Colleen.

KAREN APPLEGATE
Her eyes were donated. I, I got two different letters about her eyes and um, her kidneys were supposed to be, but I never heard from them, so I don't know if it worked or it didn't work or I never heard back. But, if, that's what I signed for them to take.

NARRATOR
Colleen Applegate went to California in March, 1982. She died there in March, 1984.

She went in search of something, not knowing what, and with only her beauty to offer in return, and she got lost.

She left home incomplete, unequipped for the adventure she'd have, lacking an inner compass.

Like Dorothy from Kansas, Colleen found herself in a dangerous forest. But there was no scarecrow along to help her find the way out.

ON TAPE

Colleen Applegate: *Maybe adults learn too much. Maybe we should all go back to being kids.*

Wouldn't it be wonderful to be a kid and keep the honesty and be totally ignorant to hate and loneliness and disgust?

JUDY WOODRUFF
A final thought. The story of Colleen's life is singular, unique...unlike any other. But it's also part of a larger, more troubling story. Each year, the number of young people in trouble seems to be increasing...some run away...some get in trouble with the law...some--like Colleen, attempt suicide. Last year an estimated 400,000 attempted suicide; 6,000 succeeded. Is all this a way of telling us that we need to pay more attention to our young people?

Thank you for joining us.

I'm Judy Woodruff. Good night.

FRONTLINE
with JUDY WOODRUFF

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Death of a Porn Queen

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